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Race and Races: Constructing a New Legal Actor

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Book Review

Race and Races: Constructing a New Legal Actor

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.

Edited By Juan F. Perea,[†] Richard Delgado,^{††} Angela P. Harris,^{†††} and
Stephanie M. Wildman.^{††††}

St. Paul: West Group, 2000. Pp. xlix, 1171. \$60.00 cloth.

Reviewed by Kathryn Abrams[‡]

INTRODUCTION

One crucial consequence of our classroom pedagogy is the formation of certain kinds of thinkers and actors. Most of us acknowledge this, in a general way: our teaching helps students to “think like lawyers.” Some scholars have theorized this thought process more specifically, when they have written, for example, about the kinds of intellectual habits engendered through rigorous exposure to the case method,¹ or the kinds of attitudes toward hierarchy produced by the substance and method of legal education.² But what is true of pedagogic methods, such as the Socratic method or case study, is also true of the texts from which students learn the law. The kinds of materials students encounter, the questions to which they are exposed, and the strategies and avenues for producing change with which they are presented, all contribute to the shaping of an actor who responds in particular ways to the law, or to the social problems it seeks to address.

Yet the recognition that choices made within casebooks can shape legal professionals has been slower to emerge, even among those scholars who have offered radical critiques of the law. Many factors may be responsible, from the institutional caution of casebook publishers to the divided attention of those seeking to establish the legitimacy of new bodies of legal

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1. KARL LLEWELLYN, *THE BRAMBLE BUSH* (1930).

2. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983).

thought.³ Even professionalization is likely to have played a role: most critical scholars were educated through the Socratic presentation of traditional Langdellian case materials. It may therefore have taken us time, and a full appreciation of the scope of our own critiques, to recognize that approaches that challenge the neutrality of traditional legal decisionmakers, or characterize law as one among many social structures that embed inequality, demand a different approach to the presentation of legal materials. For any or all of these reasons, casebooks that seek to foster a more critical and multidisciplinary understanding of the role of law and the domain of legal professionals have only gradually begun to appear.⁴

From this critical, multidisciplinary perspective, the publication of *Race and Races* reflects an important achievement. Edited by four distinguished scholars associated with the critical race theory movement, the casebook does more than compile a wide array of multidisciplinary perspectives on the meanings and consequences of race in American society. This book seeks to instill in a new generation of professionals a distinct, nontraditional understanding of the role of law in the genesis and solution of social problems. Although the book occasionally falls short of its reconstructive pedagogic aspirations, it represents a pathbreaking effort in transforming critical theory into practical, change-oriented pedagogy. In this respect, the book also reflects a major development in critical race theory as a body of thought. The increasingly insistent color-blindness of the Supreme Court,⁵ and the federal courts in general, has raised questions about

3. Beyond the complex task of bringing critical perspectives to scholarship, scholars advocating systematic change have been concerned with identifying the cases that should supplement existing sets of materials, compiling anthologies that bring new work to light, and focusing on those aspects of classroom pedagogy that hinder or facilitate critical thought, or impede or empower certain groups of students. This last task has been an object of intense focus, spawning numerous articles, conferences and published symposia. See, e.g., LANI GUINIER ET AL., *BECOMING GENTLEMEN* (1997); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989); Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); *Women in Legal Education—Pedagogy, Law, Theory and Practice*, 38 J. LEGAL EDUC. 1 (1988).

4. There are, of course, examples of such books. Many of these books are in fields that directly reflect the critical perspectives of the authors and editors. See e.g., KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (2d ed. 1998); MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1994); DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000). A few are in more traditional doctrinal fields. See e.g., JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (2d ed. 1997). These books include innovations such as extensive explorations of group-based history, multidisciplinary articles and analyses, hypotheticals and role playing exercises that sometimes employ factual or fictional narratives, and emphasis on nontraditional areas of doctrine or extradoctrinal influences on law.

5. See generally *Adarand Constructors, Inc. v. Peña* 515 U.S. 200 (1995); *Shaw v. Reno* 509 U.S. 630 (1993); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

the direction of "critical race praxis."⁶ It has challenged critical race theorists to consider how they can intervene under circumstances in which courts are unlikely to heed their message, and how critical race theory can serve, more broadly, as an instrument for achieving racial equality.⁷ *Race and Races* responds to this challenge with a vision of a legal professional whose understanding of salient social problems is only partly constituted by dominant legal understandings, and who views the courts and doctrinal intervention as only one among several strategies for producing change. This plural strategy of engaging with, while striving to decenter, legal doctrine may set a crucial course for critical intervention in the coming years. In this essay, I will describe the pedagogic innovations introduced by *Race and Races*, and the kind of legal actor they envision and help to produce. I will also explore certain ways in which these innovations proved unsatisfying, and highlight changes or new directions which might strengthen subsequent editions.

I

The conventional legal casebook seeks to introduce students to a substantively discrete body of law. In the broadly realist tradition perhaps best articulated by Karl Llewellyn, most casebooks do not aim simply to introduce students to the prevailing rules: they seek to offer students a rich enough sense of the contextual operation of those rules to engender an understanding of how legal decisionmakers will respond in future cases.⁸ Notwithstanding this postformalist emendation, the lawyer's role, to which students are socialized through this approach, is predictive, accommodative, and persuasive. Students may be encouraged to press the limits of the doctrinal logic, or probe the intellectual developments through which it has emerged, but systematic challenge to or disruption of the dominant doctrinal framework is not the order of the day. The task of the legal professional is to anticipate the likely scope of the court's response, so as to be able to characterize the client's case favorably, or produce an incremental doctrinal movement that will insure victory.

6. For discussions of this term and/or the challenges it reflects, see Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997). See also Anthony V. Alfieri, *Black and White*, 85 CALIF. L. REV. 1647, 1648 (1997) (using term "Critical Race praxis"); Angela Harris, *Race Theory in Contemporary Legal Thought*, in CONTEMPORARY LEGAL THEORY (Robert Gordon & Margaret Jane Radin, eds.) (forthcoming 2002) (using similar term "critical race practice").

7. One of the most radical responses to this challenge is Derrick Bell's *Racial Realism*, which begins from a stark recognition that the law relating to inequality is unlikely to provide the means of achieving racial equality in our society. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); See also Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994).

8. LLEWELLYN, *supra* note 1, at 3-5.

One needs only the briefest exposure to *Race and Races*, to glimpse the many ways in which it diverges from this conventional model. To begin with, its focus is not on a discrete body of doctrine, but on the many bodies of law, and related historical and cultural materials, that bear on the entrenched social problem of race-based inequality. The light that these resources shed on this problem is provocatively varied, but also organized and unified by certain recurrent themes. Many of the selections in the book, for example, share the baseline assumption that race is integral to, and deeply constitutive of, one's identity.

Yet if *Race and Races* seeks to highlight this assumption and its many implications, it seeks with equal energy to disentangle this assumption from some of the intellectual frameworks with which it has historically been connected. Many varieties of contemporary race-consciousness take their bearings from a framework which treats the experience of African Americans as paradigmatic of that of other racial minority groups, or which envisions an encompassing dichotomy between Black and White perspectives. *Race and Races* begins with the insight that the increasingly diverse racial configuration of the American population, and the distinct patterns of oppression experienced by different racial groups, demand a more plural analytic approach. The book seeks to construct this approach from a set of discrete but intersecting group-based histories, and a series of distinct though thematically-related perspectives.

The structure and substance of *Race and Races* reflects this aspiration. After a bracing chapter on the challenges of defining racism and race, the book delves into the historical experience of each of four racial minority groups (African Americans, American Indians, Latinos/as, and Asian Americans) in the United States. These rich social, political, and military histories sound recurrent themes of exclusion and marginalization, but also highlight distinguishing characteristics: the role of slavery in the African American experience; the effects of imperialism and conquest in the history of Latinos/as; the centrality of property disputes and issues of inter-governmental relations in the histories of American Indians; the dilemmas of segregation and integration in the histories of African Americans and American Indians; and the importance of immigration policies and foreign relations in the treatment of Asian Americans and Latinos/as. They are also histories in which law and legal decision making play a salient, but not dominant, role. Moreover, one quickly observes that "law" is defined more broadly in these pages than is characteristic in legal textbooks. These chapters offer the reader not simply the usual appellate opinions, but district court decisions, state and federal statutes, and federal treaties. They also provide the contemporaneous commentary of some of those responsible for these enactments; we hear the views of Andrew Jackson (pp. 188-90), for example, as a preface to the Indian Removal Act (p. 190). These

histories, finally, are interspersed with provocative editorial questions, which probe not only the materials and the student's response to the materials, but the student's prior historical exposure. The editors are aware that they are presenting materials that many students may not have encountered before; they underscore this point by asking students why they believe that such materials are frequently excluded from conventional historical surveys.

These lengthy and surprising initial chapters, comprising more than a third of the book, highlight several conceptual cornerstones of the editors' approach. The first is an emphasis on social construction in the formation of racial categories and identities. The challenges implicit in defining race for various institutional regimes, such as the birth certificate records for the National Center for Health Statistics (p. 50-55) or the census, demonstrate the complexity of the categories some students may view as straightforward. Moreover, the historical accounts, with their narratives of subtly shifting stereotypes and opportunistic characterizations of race, make clear the operation of these social forces on the lives of people of color. Should White students have any doubt that this conceptual framework applies to them as well, a chapter on "The Case of Whiteness" (pp. 429-99) challenges the transparency of race privilege. Readings such as the section on "How the Irish, Italians, and Jews Became White" (pp. 445-55) raise questions for even the most resistant students about the fixity of racial identities and meanings. Though a complex, constructivist approach to social and legal categories may be quite familiar in critical scholarship, this casebook's emphasis represents a departure in training students for a profession that often deploys racial categories as if their meaning were definitively established.

The second element visible in these chapters is the editors' understanding of law as one among many social and institutional forces that shape relations among racial groups. Law is unquestionably a prominent feature of the group-based histories that open the book. We learn about legal support for slavery and for Jim Crow (pp. 103-55); about Indian Removal (pp. 188-91) and Reorganization (pp. 216-19); about the Treaty of Guadalupe Hidalgo and its consequences for land ownership (pp. 260-90); and about Chinese Exclusion (pp. 381-95) and Japanese Internment (pp. 406-11). Yet law is not presented as an exclusive or even a predominant influence. In the opening pages of the book, for example, the editors describe one aspect of racism as "the effort to structure social life and state policy along lines of racial difference . . ." (p. 5). But while law may be one determinant of racial relations and identities, there are numerous others, from children's fairy tales (pp. 464-78) to imagery from mass media (pp. 1017-42) and cyberspace (pp. 486-88) to ideologies that ascribe

characteristics by race (pp. 5-23). These other factors also exert an influence on racial identity and receive careful coverage in *Race and Races*.

The third distinctive aspect of these chapters is the critical posture they encourage in the reader. Readers are continually challenged to interrogate the preconceptions with which they approach the material. "Did you know this?" the editors repeatedly ask, "If not, why not?" Their practice of placing at the conceptual center those histories which have often been treated as marginal, and their treatment of whiteness as a racial identity subject to social construction, offer a useful provocation to White readers who are accustomed to taking their privileged status and group's history for granted. The editors' insistence that all racial categories are constituted by contingent social influence also encourages reflection by those students of color who may be accustomed to a more static view of racial identity. Yet at the same time as the editors engender in their readers a critical stance toward their own preconceptions, they also authorize their readers to develop and refine their own viewpoints, based on the new information to which they are being exposed. At the beginning of Chapter 1, for example, the editors state:

In [this section] we will explore various definitions of racism in search of a common vocabulary and understanding. As we do so, reflect on your own starting point. When you meet a new person do you make a mental note of his/her race? Do you think about his/her ethnicity? Does your answer to these questions depend upon whom you are meeting? What do *you* think racism is? (p. 6).

The breadth and focus of these questions makes it clear to students that they are not being asked simply to point out the flaws in theoretical analyses or legal decisions, but to clarify their own perspectives on the most pressing issues raised by the book.

These initial chapters are succeeded by a series of chapters with a more explicit doctrinal focus. "Developing Notions of Equality" (pp. 500-79) are introduced through an exposition of Fourteenth Amendment and Title VII law. Readers are then exposed to doctrinal developments in areas such as "Race, Voting, and Political Participation" (pp. 580-645), "Residential Segregation, Education, and Race" (pp. 646-753), "Racism and Freedom of Expression" (pp. 754-865), and "Race and Crime" (pp. 1017-90). Yet even these chapters differ substantially from their counterparts in more conventional casebooks. Because the book surveys so many doctrinal areas germane to race, chapters are not organized around extended or chronological treatments of the elements of central legal claims. Instead, each chapter explores a limited series of doctrinal developments that are frequently illustrative of larger conceptual themes. Case law discussions are punctuated by excerpts from theoretical scholarship, often scholarship that is systematically critical of the doctrinal law being

explored. These excerpts are not the brief paragraphs used to provide jumping-off points for discussion, for example, in many Constitutional Law texts. Rather, they are extended discussions, many numbering eight or more pages, that introduce new theoretical frameworks for conceptualizing and critiquing doctrinal developments, and that discuss at length cases that are not otherwise reproduced in the text.

These doctrinally-grounded chapters are also juxtaposed with others that have an extralegal focus. "Racism and Popular Culture" (pp. 959-1016) offers some illustrative legal contexts in which cultural images may bear on decision making, but focuses primarily on the exposition of these images and the identification of the cultural contexts in which they have arisen. Similarly, "Race, Sexuality, and the Family" (pp. 866-958) explores an eclectic range of topics, from the meanings ascribed to sexual relations between masters and slaves, to contemporary practices echoing the era of forced sterilization of women of color, to the role of dating in generating racial identity for biracial teens. The issues probed in this chapter may arise from legal rules legitimizing slavery or eugenic sterilization, or prohibiting intermarriage, but they are examined as social and psychological rather than exclusively legal phenomena. A concluding chapter on "Responses to Racism" (pp. 1091-1154) explores legal and extralegal strategies, to be deployed both by Whites and by people of color, for ameliorating racism and inequality.

These chapters build on and complicate the conceptual themes introduced in the early sections of the book. Racial categories are presented not only as the shifting products of human artifice, but also as ultimately inadequate to contain the complexity of racial experience. The difficulties of classification are a recurring theme in these chapters, as are the social and individual meanings of bi- or multiraciality. Shirlee Taylor Haizlip's essay on being a Black woman whose life "[has] been deeply colored by [her] absence of deep color" (pp. 948-50), and Lisa Jones' fictional interview with the "Identity Fairy," who discusses multiracial identity and the movement to add the category "multiracial" to census forms (pp. 951-58), are vivid and evocative illustrations of these themes. The law's role as one among many influences in the construction of race is paralleled by its role as one among many expedients necessary to remedy racial inequality. The editors pose questions that encourage doctrinal critique, and help students flesh out the arguments that might be used to support new doctrinal positions. But they also present "classroom exercises" in which students are asked to position themselves as school board members, institutional planners, and voters, as well as legal advocates.⁹

9. An illustrative exercise appears at the end of the chapter on "Racism and Freedom of Expression." It presents students with a bill that would make Spanish the official language of Florida. After asking students "[w]ould such a measure be constitutional?" the editors follow with a series of

In the final chapter on ameliorative strategies (pp. 1091-1154), students are urged to consider the role of coalition building and various forms of interpersonal engagement. The critical stance students are urged to take toward their own preconceptions in the initial chapters of the book is extended to the major legal and cultural institutions of our society. Students are encouraged to apply a critical lens to judicial decisions, legal initiatives, social practices, and cultural imagery. Moreover, the questions advanced by the editors have affective as well as analytic components. After presenting Lenore Look's narrative on her mother's decision to vote for the first time after many years as a naturalized citizen (pp. 580-82), the editors ask their readers, "Did you have an emotional reaction when Ms. Look's mother said that she had finally voted? Positive or negative? What meanings are imbedded in the idea of voting?" (p. 583). Readers are encouraged to draw on their feelings and intuitions as resources for evaluating new perspectives, as well as on their analytic powers.

In short, *Race and Races* strives to bring into being a law student and prospective legal professional distinct from the conventional product of Langdellian pedagogy. This student learns to direct her thinking toward the resolution of social problems in which law is implicated, as well as toward bodies of doctrine. She learns to view law not as autonomous, but as a politically and culturally embedded resource, which shapes and is shaped by other social and institutional practices. She comes to understand the ongoing social contention that has been central to the production of racial categories, and the shifting social meanings that threaten constantly to exceed the most complex or variable categories we construct for them. She is reflective about, and sometimes critical of, her own experience as a guide to legal and social understanding, but she also feels sufficiently authorized to begin to formulate new frameworks and understandings as she gains new knowledge. She does not hierarchize emotion and reason, but deploys both so as to more fully understand the social and legal practices to which she is exposed. She uses law, and a variety of other institutional, coalitional, and interpersonal resources, in pragmatic combination, to address the remedial tasks connected with the problem. Of course, few students are likely to develop all of these habits of mind through exposure to a single casebook. But the incitement that *Race and Races* provides to question familiar methodological assumptions and develop new ones, and the aspiration it demonstrates to cultivate such understandings in a new generation of law students as well as in scholarly colleagues, are some of the book's most promising achievements.

less conventional questions that ask students to position themselves in a different way: "If you lived in Florida, would you vote for it? Learn Spanish as quickly as possible? Gladly, or grudgingly?" (p. 865).

II

Notwithstanding these valuable innovations, *Race and Races* sometimes falls short of its aspirations. Some of these shortcomings relate less to the conceptual innovations discussed above than to the book's substantive treatment of certain issues relating to race. Selection of representative doctrinal areas is inevitably challenging; when questions of race infuse a legal system as thoroughly as they do ours, reasonable minds may surely differ about the importance of various topics. Nonetheless, a few choices made by the editors seem surprising.

First, the book offers no discrete, sustained treatment of the intersection of race and gender. This seems a noteworthy omission, given the strong and growing body of legal and related scholarship located at this intersection, and given the prominence of two of the casebook's editors in this very area.¹⁰ There is no doubt that gender is consistently at issue in the chapter on sexuality and family (pp. 866-958); and it is also treated more episodically in sections on employment discrimination (pp. 570-79), crime (pp. 1017-90), freedom of expression (pp. 754-865), and voting (pp. 580-645). But to explore gender predominantly under the rubrics of sexuality and family risks confining it to two of its most limiting conceptualizations. More affirmatively, to explore intersections between gender and race in a more systematic way might provide another concrete way of demonstrating the complexity of racial categories, or of revealing connections or contrasts among different examples of racism. For example, the editors could have afforded this set of issues a larger chapter, including or in addition to the explorations of sexuality and family.

A second choice that raised questions was the omission of any sustained analysis of race and poverty, or of recent efforts to reform the welfare system. An emphasis on poverty was, again, not altogether absent. The relationship between race and poverty is implicated in the materials on residential segregation, on race and family, and on race and crime. But the complex entanglements between these two characteristics, for most of the groups the book surveys, would seem to merit separate treatment. Moreover, recent legislative efforts at welfare reform, culminating in the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,¹¹ are so heavily marked by ideologies of race, and have such potential to immiserate women of color and their children, that they seem to demand more extended treatment.

10. See, e.g., STEPHANIE M. WILDMAN, ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

11. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 7, 8, 21, 25 and 42 U.S.C.).

The editors also seem ambivalent about their own use of categorization, when they seek either to cluster cases within subject areas or to conceptualize the accounts of inequality presented in some of the longer excerpts. The chapter on "Race, Sexuality and the Family" (pp. 866-958), for example, brings together a wide array of factually distinct issues, but organizes them only very broadly under the headings of "Sexuality," "Marriage," and "Children and Families." The variety of cases within each category, and the issues that recur among categories (each, for example, includes issues of coercion or consent, or fluidity or fixity in identity) made me wonder whether a more decisive, conceptual form of organization would have been more helpful to the reader. The chapter on developing notions of equality makes a similar, substantively-based distinction between the Fourteenth Amendment and Title VII, leaving the excerpted articles to do the more strenuous work of framing the specific notions of equality themselves. Here, too, a heavier conceptual hand by the editors might have clarified things for the reader: a chapter organized by different notions of equality, which scholars have observed¹² cut across different constitutional and statutory categories, might have helped the reader to see the emergence of particular conceptions and to make comparisons among them. There are plausible reasons for the editors' reticence in these respects: a casebook that aims to foster critical thinking in its readers may want them to expend energy to grasp its organization. More importantly, a book that aims to highlight the inevitable limitations of categories might wish to avoid imposing too many of its own. But it is possible to overstate these rationales, and there are strong arguments on the other side. The broad range and ambition of this casebook (and the fact that it might successfully be used as an introduction to this area) make an effort toward greater clarity in presentation important. Moreover, students learn to challenge and resist categories by first understanding how they operate. A greater willingness by the editors to conceptualize groups of cases and theoretical insights to which they contribute would help on both of these counts.

Other weaknesses in the book bear more directly on its mission of producing a new kind of legal actor. The book might have been strengthened, for example, by a more sustained treatment of the affirmative meanings of race.¹³ The affirmative valuation of minority racial experience, and

12. See, e.g., Tracey E. Higgins & Laura A. Rosenbury, *Agency, Equality and Antidiscrimination Law*, 85 CORNELL L. REV. 1194 (2000); D. Marvin Jones, *No Time For Trumpets: Title VII, Equality and the Fin de Siecle*, 92 MICH. L. REV. 2311 (1994) (describing continuities in constitutional and statutory doctrines relating to race discrimination).

13. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 99-103, 107-10 (1991) (describing affirmative racial imagery that Black women have generated to contrast dominant images); SHIRLEE TAYLOR HAIZLIPP, *THE SWEETER THE JUICE: A FAMILY MEMOIR IN BLACK AND WHITE* (1994) (offering affirmative conceptions of African American racial identity that have emerged within

of racial difference, has met with a mixed reception in the law. The once-potent state interest in diversity¹⁴ is now embattled,¹⁵ and other rationales for affirmative action have suffered even harsher fates.¹⁶ But the next generation of lawyers, who are being trained to address race-based inequality with a range of legal and extralegal resources, should be equipped to convey a full understanding of the affirmative meanings of minority racial experience. These meanings surface in some sections of the book: they are particularly salient among biracial writers of Black and White parentage like Shirlee Taylor Haizlip (pp. 948-50) and Lisa Jones (pp. 951-58), who reflect pride in and deliberate identification with their blackness. Such meanings are also a factor in the desegregation cases discussed by Drew Days (pp. 710-22), in which Black plaintiffs seek state support for racially identifiable schools rather than further efforts at racial integration. But there are other sections that would have been enriched by a discussion of such affirmative meanings.

The history of residential segregation in this country is importantly one of stigmatization and exclusion, but there are also instances of more self-consciously affirmative or ambivalent residential groupings. What affirmative benefits are gained through the creation or preservation of Chinatowns in major urban areas? What positive experiences and identifications arise from neighborhoods strongly populated by members of a flourishing Black middle class? What dilemmas arise for successful people of color as they contemplate departing central city areas for the suburbs? More emphasis on the affirmative meanings assigned to race would highlight complexities or tensions within the self-conceptions of minority populations, and would underscore the agency of people of color in resisting dominant racial ideologies.

Another weakness is the book's failure fully to disrupt a unitary paradigm for understanding racism and race. One of the editors' prime examples of the limits of categorical thinking is the tendency to conceptualize race in "black and white": to use the species of racism directed against African Americans as a paradigm for understanding other kinds of racial discrimination. The need to go "beyond black and white" has an aspirational aspect as well: today's race lawyers, who will confront a far more

the author's own experience). There are also qualitative, empirical accounts that seek to give content to the sometimes strategic legal or policy claim that racial diversity makes an affirmative institutional contribution. See RICHARD J. LIGHT, *MAKING THE MOST OF COLLEGE: STUDENTS SPEAK THEIR MINDS* 129-89 (2001).

14. See *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (diversity accepted as important state interest); *Regents of the Univ. of Cal. v. Bakke* 438 U.S. 265 (1978) (Powell, J.) (diversity accepted as compelling state interest).

15. See *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (diversity rejected as compelling state interest); *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 843-50 (E.D. Mich. 2001) (same).

16. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (role model theory rejected as compelling state interest).

plural social world, should understand how to conceptualize and address the different dimensions of racial inequality in a more comprehensive way.

Yet the editors are only partially successful in their efforts to displace, or pluralize, this paradigm. The excerpts from scholarship that address this theme, notably the important work done by editor Juan Perea (pp. 549, 858-59, 1017-18), focus more on the critique than on the reconceptualization. And the more practical proposals, such as Mari Matsuda's injunction to "Ask the other question," that link racism with other systems of oppression (p. 1113), offer pragmatic incitements to further thought, rather than the outline of a more complex conceptual structure. Moreover, the readings in several of the doctrinal sections tend to focus primarily on the experience of African Americans, either underemphasizing the distinct experiences of other groups, or treating the experience of Blacks as paradigmatic. This is not, to be sure, a consistent problem. Some chapters, such as the discussion of voting rights, are surprisingly plural given the central role played by African Americans in extending the right to vote. Others, such as the chapter on crime, intersperse discussions of stereotypes regarding Blacks (and Latinos/as) as perpetrators with discussions of stereotypes regarding Asians as victims. But in some chapters, such as the chapter on residential segregation and education, the focus on African American patterns predominates; the reader finishes the chapter with unanswered questions about contrasts between Blacks and other racial minority groups. In the discussion of cross-racial adoption, White parents' adoption of Black children is, again, the primary focus. This focus is in some respects justified: this particular pairing has been the subject of greatest controversy, because of the numbers of African American children in need of permanent homes, and because of the opposition of the National Association of Black Social Workers to White adoption of Black children (p. 946). Yet other patterns, which have become increasingly prevalent, such as the adoption by White parents of female infants from China, would seem to raise distinct issues. While these are addressed in a few provocative editorial questions (p. 948), a more extensive, textual treatment might help the reader to envision a more plural conceptual framework.

A more fully-theorized, multiracial framework would not only juxtapose the assumptions and ideologies that affect different minority groups, it might also explore salient tensions within these groups themselves. It is important not to overemphasize intra-group (or inter-minority-group) divisions, particularly when some of these arise from the constraints imposed by racial hierarchy and inequality.¹⁷ But while the same is true, for example, within feminism, analyses of divergences among feminists (or among

17. See Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. GENDER RACE & JUST. 335 (1998) (discussing role of intersecting inequalities and hierarchies in creating conflicts among groups of women).

women) have fruitfully illuminated tensions within the goals and self-conceptions of the group.¹⁸ Several features of the current organization of the book make such analyses difficult. The decision to explore history group-by-group, rather than on a multi-group, chronological basis, complicates the drawing of contrasts regarding the White majority's treatment of different minority groups. It also complicates the analysis of relations among groups (or within groups) by focusing instead on each group's relationship to dominant Whites. Furthermore, the editors explore relatively few instances of either tension or coalition among racial minority groups, or subgroups thereof. They describe some disagreement among Latinos/as, or among Asian Americans, for example, about English-only statutes (844-56, 859-61), and they return on several occasions to the divisions among biracial and multiracial individuals about the movement for new census categories (pp. 64-77, 951-58). But there are other places, such as in the areas of racial districting and interracial adoption, where further exploration of the dialogue among and within minority groups would have been illuminating.

Finally, the editors' articulation of a new role for lawyers committed to racial justice, while a noteworthy departure, does not extend as far as it might. The clear implication of the book is that a lawyer confronting entrenched inequality, and the law's continuing implication in that inequality, must have a range of remedial resources at her disposal. She must continue the ongoing efforts to use doctrine and legislation to her advantage, but she must also understand the importance of addressing nonlegal barriers to equality with non-legal means. And she must be able to shift pragmatically to the latter form of solution when legal efforts are thwarted. To fuel this pragmatic impulse the editors explore a range of remedial strategies, particularly in the final chapter. They offer Martin Luther King's *Letter from a Birmingham Jail* (pp. 1097-1104), discuss strategies of coalition building (pp. 1104-17), and explain the practice of "race treason" by Whites (pp. 1118-21). They also offer excerpts on racial healing, in the form of apology (pp. 1123-30) and collaborative participation in various forms of cultural exploration (pp. 1130-35). It is new and enlivening to see these strategies as resources that every beginning lawyer should have at her disposal. Yet the approaches surveyed by the editors seemed in some respects to reflect a dichotomous strategy of the legal and the interpersonal. Without denying the crucial character of legal or interpersonal strategies for political change, I wondered if they might have focused more on fleshing out a middle

18. See, e.g., SEYLA BENHABIB ET AL., *FEMINIST CONTENTIONS* (1995); *CONFLICTS IN FEMINISM* (Marianne Hirsch & Evelyn Fox Keller, eds.) (1990). See also JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (discussing conflicts among different schools of feminist thinkers and advocates in the context of work or family conflict).

ground. King's words, for example, allude to a range of nonviolent action strategies that have been and might be used in the struggle for racial justice. It might have been helpful to elicit discussion of various examples. Discussion of institutional approaches, such as those that have succeeded within governmental institutions, businesses, or civic organizations, would also have been helpful. Lawyers often counsel such institutions, and familiarity with successful strategies might be an integral part of that role. Finally, strategies of economic or cultural self-sufficiency for racial minorities¹⁹ might usefully be explored, to complete the range of options available to the new generation of legal professionals.

III

Happily, many of these drawbacks can be remedied by supplementation; the editors of a casebook have opportunities for revision that authors of other scholarly works may not enjoy. They do not, in any case, detract substantially from the very real accomplishments of *Race and Races*. To use the opportunities provided by a casebook to help form a different kind of legal professional is no small achievement, particularly given the relative stasis of legal pedagogy (as opposed to legal scholarship) over the last decades. It is, moreover, an achievement that seems particularly imperative in light of recent movements in the law relating to race. With the Court's turn to color blindness,²⁰ and increasingly restrictive reading of Congress' power over civil rights,²¹ and with the prospect of new Republican-appointed justices on the horizon, we may be approaching the time prophesied by Derrick Bell in his incitement to "Racial Realism":²² a time when it becomes clear that neither legislation nor legal doctrine will provide the answer to racial inequality. This impasse poses a crucial challenge to equality lawyers who have turned consistently to the legal system, and to critical race theorists who have questioned this strategy, but now find an even less reliable audience among lawyers and judges for their reconstructive theorizing. By training a generation of lawyers who can deploy

19. Regina Austin has done thoughtful and challenging work on this question. See, e.g., Regina Austin, "An Honest Living": *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119 (1994); Regina Austin, "Not Just for the Fun of It!": *Government Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998).

20. See cases cited *supra* note 5.

21. The Court has recently begun to restrict this power through several confluent lines of doctrine. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (limitations on Congress's Commerce Clause power); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (limitations on Congress's enforcement power under Section 5 of the Fourteenth Amendment); *Morrison*, 529 U.S. 598 (same); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (same); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (refusals to abrogate state sovereign immunity in the context of statutory civil rights actions); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (same).

22. See Bell, *supra* note 7.

institutional, coalitional, and interpersonal strategies as they undertake reconceptualizations that permit renewal in the legal system, educators such as the authors of *Race and Races* may provide the best chance for surviving, and transforming, this impasse.

Book Review

Teaching the Law of Race

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.

Edited By Juan F. Perea,[†] Richard Delgado,^{††} Angela P. Harris,^{†††} and
Stephanie M. Wildman.^{††††}

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Reviewed by Anthony V. Alfieri[‡]

INTRODUCTION

For too long, scholars have debated the place of race in the legal academy. Clothed in private silence and public quarrel,¹ the debate rises again in the wake of the duly celebrated publication of *Race and Races: Cases and Resources for a Diverse America*. Situated at the intersection of civil rights, jurisprudential, and interdisciplinary movements, *Race and Races* provides a sweeping account of race in American law and society.² Interest in this account will be keen for those seeking to understand the theory and

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1. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

2. For complementary accounts, see CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jr. et al. eds., forthcoming Feb. 2002); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 1999); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); RACIAL CLASSIFICATION AND HISTORY (E. Nathaniel Gates ed., 1997); and READINGS IN RACE AND LAW: A GUIDE TO CRITICAL RACE THEORY (Alex M. Johnson, Jr. ed., 1998). See also ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (1998).

practice of race in law, and equally important, in lawyering and ethics.³ Often stymied, advocacy-grounded efforts to grasp the meaning and take the measure of race in action demand the mapping of law and the lawyering process in race cases along the boundaries of racial identity, racialized narrative, and interracial community.⁴ Careful mapping enables lawyers and judges to embrace race when relevant and, conversely, to reject it when inapposite. Elsewhere I have argued that these boundaries starkly demarcate the practice of criminal law, particularly the prosecution and defense of racial violence.⁵ Beyond the criminal law, however, the scope and depth of racial boundaries lie largely unmarked.⁶

Accordingly, the first purpose of this Book Review is to mark the boundary lines of contemporary sociolegal research on race synthesized by the distinguished editors of *Race and Races* and tested, indeed sometimes traversed, by the accompanying book reviews in this collection. In addition to framing the bright lines of discussion for this rich collection, the second purpose of this Review is to critique the effort by the editors to set down some rough markers surveying the meaning of racial identity, the content of racialized narrative, and the form of race-neutral and race-conscious representation. *Race and Races* establishes the groundwork for its analysis by tracing the genealogy and multiplicity of race and racism, splicing race to law, citizenship, culture, and society, and finally, adjoining race to legal and social reform. To integrate these themes, the editors formulate certain guiding principles of criticism. Applied to the sociolegal text of race, these

3. See Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996); Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571 (1999); Elaine R. Jones & Jaribu Hill, *Contemporary Civil Rights Struggle: The Role of Black Attorneys*, 16 NAT'L BLACK L.J. 185 (1999); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995).

4. Racialized narrative refers to the racial rhetoric (the race talk) found in the juridical storytelling of lawyers and judges. Interracial community refers to the convergence and clash of interests among communities of color. For a deft illustration of the mapping of narrative and community in the context of race, see David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)).

5. See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *(Er)Racc-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); Anthony V. Alfieri, *Racc-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).

6. See Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965 (1997); Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997).

rules of reading urge us to “make the implicit explicit” and to “look for the hidden norm” (p. 3). Moreover, they direct us to “avoid we/they thinking” and “remember context” (p. 3). Further, they steer us toward “justice” by contemplating “benefits and harm” (p. 3). Last, they exhort us to “trust intuition” (p. 3). Against this backdrop of textual construction and criticism, the Review follows the discrete divisions of the casebook: Part I examines the genealogy of race and racism, Part II analyzes the multiplicity of race and racism, Part III considers race, law, and citizenship, Part IV explores race, culture, and society, and Part V assesses race and reform in legal theory and practice.

I

THE GENEALOGY OF RACE AND RACISM

Race and Races opens by evaluating the relationship between the practices of racism and the concept of race. Racism, according to the editors, carries material and ideological import for both the collective and the individual. For the collective, material racism infects the structure of social life and state policy. For the individual, racism inflicts particularized harm. Contingent on racial difference, these material practices find justification in “a pool of beliefs, symbols, metaphors and images” that define a natural order (p. 6).

From the outset, the editors challenge the natural order of race. Deploying the work of a wide variety of scholars, they assert that in American history “racial hierarchy rather than racial equality has been the fundamental organizing principle” (p. 14). For example, Benjamin Ringer and Elinor Lawless argue (pp. 6-11) that the genealogy of race and racism originates in “the colonial expansion of the White European from the fifteenth century onward” (p. 6). Initiated by early Spanish conquistadors and English settlers, this expansion created a dual colonial society, racially segmented between dominant Whites and subordinate non-Whites. Tessie Liu (pp. 11-12) shows how that duality, linked to European dynastic customs and colonial racial privileges, produced “bifurcated visions of womanhood” (p. 11) that cast White women as guardians of civilization and non-White women as both desexualized laborers and easily available sexual objects. Such visions of privilege and their constituent categories of racial and gender subordination permeated the structures of the colonial world so thoroughly as to make them appear natural, even banal. It is precisely the banality and seeming naturalness of what Michael Omi and Howard Winant call “racial dictatorship” (pp. 12-13) that allowed it to shape historical notions of identity, color, and nationalism through coercion and consent (pp. 6-14).⁷

7. Omi and Winant remark that “hegemonic forms of racial rule—those based on consent—eventually came to supplant those based on coercion” (p. 13).

To amplify the ideas of physical force and ideological enforcement, the editors weave together multiple theories of oppression, such as Iris Young's politics of difference (pp. 14-15), and Robert Blauner's catalogue of colonized minorities (pp. 16-20), offering a broad "account for the many different ways in which [racialized] groups can be oppressed" (pp. 15-16). The account also draws on Joel Kovel's psychohistory of White racism (pp. 23-25), and Robert Williams's research on European racism and colonialism (pp. 26-28). It cites both conscious and unconscious forms of racist microaggression, noting Robert Chang and Keith Aoki's work on nativism (pp. 28-31), Linda Hamilton Krieger's study of cognitive bias (pp. 33-36), and Charles Lawrence's writing on the unconscious (pp. 37-41). It also usefully recommends classroom exercises and scenarios elucidating the individual, cultural, and institutional dimensions of racism. The classroom exercises strive to discern the presence or absence of racism on college campuses and city streets, as well as in high schools and in the media (pp. 20-23). Discernment, the editors remark, entails multiple theories and definitions of racism marked by the relationships of perpetrator and victim, individual and institution, culture and society, ideology and practice, and conscious and unconscious intent. Although often overt, the social and cultural relationships of racism sometimes vanish under the neutral veil of legal pedagogy (pp. 1145-54) and practice.⁸

In the practice of law and lawyering, racial microaggressions routinely take the form of stereotyping at trial in criminal and civil actions.⁹ Turning to practice, the editors describe the microaggressions of racial stereotypes in courtroom advocacy and trial testimony. Their account calls attention to the "[a]mple evidence" of stereotyping suffusing the legal process. Surprisingly, the account fails to call for the establishment of an ethical duty to refrain from or to avoid "triggering" racial advocacy, especially in criminal cases. Instead, in an apparent concession to race-saturated lawyering, the editors suggest that while lawyers' "playing of the race card" may be repugnant, the "special duty of 'zealous advocacy'" to criminal clients may sometimes call for a defense lawyer to exploit party, juror, or public prejudice. Rather than resolve this tension, the editors use it to provoke reflection about the permissible ambit of lawyer professional responsibility in race cases (pp. 36-37), leaving others to make the case for an ethical duty to refrain from race stereotyping in the courtroom.¹⁰

Specifically, the editors show how private and public stereotyping, and state-sanctioned exclusion and inclusion, take shape through a series of material and discursive practices fashioning the definition of race. These

8. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

9. See Alfieri, *Defending Racial Violence*, *supra* note 5; Alfieri, *Race Trials*, *supra* note 5.

10. See Alfieri, *(Er)Race-ing an Ethic of Justice*, *supra* note 5; Alfieri, *Race-ing Legal Ethics*, *supra* note 5.

practices can be glimpsed in Christopher Ford's work on state administrative differentiation in the classification of people by race (pp. 50-55), and in Joe Feagin and Clairece Booher Feagin's writing on the development of the concept of race in biology and social science (pp. 56-58). This work is buttressed by Tessie Liu's analysis of race and gender as social categories of knowledge and proof (pp. 58-59). In fact, Yen Le Espiritu contends that the legal sedimentation of nineteenth-century racial categories produces a kind of "pan-ethnicity" in the treatment of different minority ethnic groups under the racial rubric of a single, dominant culture (p. 60). The tendency toward pan-ethnic groupings in law and legal practices strains against color-blind traditions in constitutional, statutory, and regulatory jurisprudence. This tension emerges in Neil Gotanda's examination of the false color-blind quality of constitutional jurisprudence (pp. 61-63), Luis Angel Toro's review of obscurantist ethnic classifications (pp. 64-69), and Tanya Kateri Hernández's exploration of "pseudoscientific" multiracial classifications (pp. 69-77). The editors marshal this literature to declare that "race is fluid, rather than fixed" and to countenance "the increasing number of openly multiracial people" (p. 77). The fluidity of multiracial identity categories adds complexity to the advocacy and adjudication of civil rights claims, such as those at issue in the racial classification of American Indians in *Arthur Perkins v. Lake County Department of Utilities* (pp. 77-90).¹¹ Civil rights advocates struggle to contain this fluidity both as a matter of strategy¹² and as a matter of professionalism.¹³ Unfortunately, the editors make no recommendations on how to cabin and sort out this growing complexity, moving instead to a discussion of multiplicity.

II

THE MULTIPLICITY OF RACE AND RACISM

With the theoretical foundation in place, the editors next trace the particular histories and struggles of four groups: African Americans, American Indians, Latinos/as, and Asian Americans. The juxtaposition of those histories shows both the multiplicity and the unity of racism in the United States. Multiplicity gains from both external and internal comparison of these diverse groups. Externally, their ranks span two centuries of colonial and imperial expansion. Internally, their color, geography, and political economy vary across region and locale. Yet, despite such differences, they experience unity in the changing caste of racial subordination.

11. 860 F. Supp. 1262 (N.D. Ohio 1994) (discussing the extent to which provable genetic and hereditary classification controls membership in a protected class under Title VII).

12. See Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

13. See Russell, *supra* note 6.

A. African Americans

For the editors, parsing the multiple strands of race and racism in American history highlights “the constant, rational struggle of African Americans against the oppression imposed upon them” (p. 91). That struggle frames the editors’ discussion of African American history beginning with the colonial assumptions made by the Framers, notably Benjamin Franklin and Thomas Jefferson. Their eighteenth-century view of race, difference, and the natural inferiority of African Americans animated the early debate over slavery and secured its constitutional accommodation, in spite of countervailing natural-law ideology and abolitionist judgment, best exemplified by Frederick Douglass’s essay *The Meaning of July Fourth for the Negro* (pp. 106-07).

To resolve this constitutional contradiction and to avoid the reductionism of property-based interest analysis, the editors focus on the “lived experiences and histories” of race in American society (p. 107). They uncover those histories in the legal and social structures of slavery, citing the text of the Virginia slave laws (pp. 108-11) and the violence of slave conditions disclosed in the despairing 1861 interview of Lavinia Bell (pp. 112-14). Strict judicial enforcement sustained this regime of legal violence erected upon the fear of slave insurrection and resistance. Examples include the perverse North Carolina and Louisiana state court opinions of *State v. John Mann* (pp. 114-16)¹⁴ and *Kennedy v. Mason* (pp. 116-18).¹⁵ Both narrowly interpreted property and tort laws to endorse a slaveholder’s property rights in slaves “damaged” by third parties, but denied the slaves’ own rights to seek redress for abusive treatment. This jurisprudence of state-sanctioned cruelty acquired sufficient force of logic to overcome the sentiment of anti-slavery southern judges. Herbert Aptheker documents the way this jurisprudence worked to suppress slave rebellion. Suppression occurred not only through physical force, but also through the denial of citizenship in *Dred Scott v. Sandford* (pp. 123-25),¹⁶ a case later denounced in Frederick Douglass’s speech to the American Anti-Slavery Society (pp. 126-29).

Although they advert to the antislavery moral discourse of the Abolitionist movement and the opprobrium towards slavery expressed during the Civil War, the editors note the ambivalence and expedience of the Reconstruction Era’s attitudes toward African American equality, citing the core weakness in the equality principle soon manifested in an upsurge of federalism doctrine protecting state interests and in Jim Crow

14. 13 N.C. (2 Dev.) 263 (1829) (discussing whether a cruel and unreasonable battery on a slave by the hirer is indictable).

15. 10 La. Ann. 519 (1855) (holding slave overseer liable to the owner for slave mistreatment and killing).

16. 60 U.S. 393 (1856).

segregation laws. Given legal encouragement from the Supreme Court's holding in *Plessy v. Ferguson* (pp. 142-47),¹⁷ the Jim Crow Era of separate-but-equal laws not only disenfranchised Blacks through literacy qualifications, poll taxes, and the White primary, but also degraded their education through deficient public schools and textbooks. Reinforced by the lynching and mob violence recounted in Barbara Holden-Smith's historical digest (pp. 149-51), this degradation and isolation extended even into the American military both here and abroad in the twentieth century. In the 1918 French Directive (p. 153-54), for example, the U.S. Army attempted to discourage fraternization between French and American Black troops because it might incense White Americans.

Shifting to the modern era, the editors survey post-WWII segregation, the rise of the NAACP, and the civil rights movement. Here they embrace the early litigation campaigns crafted by Charles Hamilton Houston and Thurgood Marshall, and the collective action and organized protest of the Montgomery bus boycott and the student sit-in movement in Greensboro, North Carolina (pp. 156-64). Skeptical of formal equality as a bulwark against racial violence, however, the editors limit their celebration of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, a dissonance that haunts advocates and antiracist judges alike (pp. 129-72). To be clear, that discordancy in no way inhibits the advocacy or enforcement of civil rights remedies. Instead, it shrouds the pursuit of equality in the despair of unrealized hopes.¹⁸

B. American Indians

The editors continue their exploration of American racism by turning to the history of American Indians, emphasizing the diversity and particularity of the Indian nations. Their starting point is the doctrine of conquest and dominion depicted in *Johnson v. McIntosh* (pp. 175-78).¹⁹ Borrowing from the work of Robert Williams on the cultural bias of federal Indian law, the editors scrutinize the views of the Framers expressed in the 1783 correspondence of George Washington to James Duane and in Washington's Third Annual Presidential Address to Congress, subsequently reiterated in the 1803 letters of President Jefferson to William Henry Harrison and in Jefferson's *Confidential Message Recommending a Western Exploring Expedition*. Surprisingly restrained in its racial tenor, the Washington-Duane correspondence refers to the Indian nations as

17. 163 U.S. 537 (1896) (upholding constitutionality of 1890 Louisiana statute providing for separate railway carriages for the "white and colored races").

18. See DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996); LINN WASHINGTON, *BLACK JUDGES ON JUSTICE* (1994).

19. 21 U.S. (8 Wheat.) 543 (1823) (discussing federal court recognition of Indian tribal land claims).

"Savages" and "Wild Beasts of the Forest," while Washington's 1791 Presidential Address adverts to the "deluded tribes" of the Indian nations as "an unenlightened race of men" (pp. 179-82). The Jefferson-Harrison letter on Indian affairs urges the cultivation of the "affectionate attachment" of the Indian nations through mercantile trade and debt accumulation; Jefferson's *Confidential Message* similarly lauds the "wisdom" of economic exchange (pp. 183-84). Reflected in the substance of early federal Indian policy, those views approved White expansion and Indian displacement, through force and seizure if necessary (pp. 173-85).²⁰

The editors track these foundational views in the development of federal Indian policy under the Indian Trade and Intercourse Acts of 1790 to 1834 and the Indian Removal Act of 1830 (pp. 186-88, 190). Echoed in President Andrew Jackson's *First Annual Message to Congress* in 1829 (pp. 188-90), such views reached fruition in the White state law and land seizure prerogatives of *Cherokee Nation v. Georgia* (194-202),²¹ the asserted state sovereignty and constitutional resistance of *Worcester v. Georgia* (202-07),²² and the frustrated federal criminal jurisdiction over Indian reservations in *Ex Parte Crow Dog* (pp. 208-12).²³ However deeply contested, the judicially condoned state prerogatives of seizure and removal complemented the paternalistic expansion of federal court criminal jurisdiction over Indian reservations in *United States v. Kagama* (pp. 213-15)²⁴ and the congressional splintering of tribalism under the plenary power of the General Allotment Act of 1887 in *Lone Wolf v. Hitchcock* (p. 216).²⁵ While the Indian Reorganization Act of 1934, recounted by Vine Deloria, Clifford Lytle, and Felix Cohen (pp. 217-19), ended the policy of privatizing tribal land through allotment and renewed the notion of tribal sovereignty and the doctrine of reserved rights, the editors point to the identity politics of the "termination period" as the reawakening of Indian consciousness-raising, resistance, and self-determination manifested in the 1961 *Declaration of Indian Purpose* (pp. 221-23) and the disputed employment preference of *Morton v. Mancari* (pp. 208-28).²⁶ This reawakening, they add, evolved in tension with the diminished-rights claims of *Lac*

20. Consider also Jefferson's 1785 letter to the Marquis de Chastellux (p. 185) (comparing Indian and Black claims to White equality).

21. 30 U.S. (5 Pet.) 1 (1831) (reviewing Georgia statutory seizure of Cherokee land).

22. 31 U.S. (6 Pet.) 515 (1832) (invalidating Georgia state law prosecution of Vermont citizen for residing on Cherokee land).

23. 109 U.S. 556 (1883) (voiding Dakota criminal indictment, conviction, and sentencing of member of Brule Sioux Indian nation).

24. 118 U.S. 375 (1886) (permitting federal criminal court jurisdiction over Hoopa Valley Indian reservation murder).

25. 187 U.S. 553 (1903) (dismissing Kiowa, Comanche, and Apache Indian challenge to congressional enactment of Allotment-era statutes as non-justiciable political question).

26. 417 U.S. 535 (1974) (rejecting non-Indian employee race discrimination and due process challenge to the Bureau of Indian Affairs' employment preference program).

*du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*²⁷ and the eroded commitment to tribalism and equality (pp. 228-30). It is unclear whether a similar normative deterioration will impede the international human rights strategies of indigenous peoples recalled by James Anaya and the legal rights struggle of native Hawaiians (pp. 236-46).

C. *Latinos/as*

The historical experience of Latinos/as is marked by their survival of a double conquest: first by Spain, and then by the United States through its annexation of Texas and the 1846-48 War with Mexico. Stripping away the rhetoric of Manifest Destiny, the editors reveal the familiar currents of White supremacy and racial dominion driving the conquest of Mexico and the invasion of Puerto Rico. Rhetorically, the currents of imperial superiority inform the history of the amendment and ratification of the 1848 Treaty of Guadalupe Hidalgo (pp. 260-66). That history chronicles the diminution of Mexican American citizenship claims, coupled with the dilution of their legal status and the restriction of their land ownership rights. For illustration, the editors cite the citizenship borders of the California Constitution of 1849 (pp. 266-67) erected to permit only White citizens to vote. Bolstered in *People v. De La Guerra* (pp. 267-270),²⁸ the borders confirm that the treaty-ratified grant of citizenship did not guarantee the possession of all political rights such as the exercise of the electoral franchise in California. The editors demonstrate how United States courts expanded these borders of exclusion by construing land grant claims to dispossess Mexican property owners under the ideology of Manifest Destiny in the Northern New Mexico land grant litigation (pp. 272-75), and under the weight of cases such as *John Charles Fremont v. United States* (pp. 275-78),²⁹ *De Arguello v. United States* (pp. 278-80),³⁰ *Botiller v. Dominguez* (pp. 282-83),³¹ and *United States v. Sandoval* (pp. 284-87).³²

Having shown the futility of litigation and the ubiquity of violence, the editors next count the varied modes of Mexican American resistance to American conquest in the Southwest. Reciting the history of the Cortina Wars and the New Mexico Land Grant Wars, as well as border folklore

27. 759 F. Supp. 1339 (W.D. Wis. 1991) (issuing preliminary injunction prohibiting private individuals from interfering with the Chippewas' off-reservation spearing of walleye).

28. 40 Cal. 311 (1870).

29. 58 U.S. (17 How.) 542 (1854) (confirming validity of Mexican American land conveyance).

30. 59 U.S. (18 How.) 539 (1855) (affirming validity of Mexican land grant claim to California ranch).

31. 130 U.S. 238 (1889) (approving federal statutorily created California Land Claims Commission jurisdiction over private land claims of Mexican citizen).

32. 167 U.S. 278 (1897) (confirming land grants to individual settlers, rather than common lands, in New Mexico territory).

(pp. 293-99), they stress that Mexican American resistance continues in contemporary battles over linguistic primacy, educational equality, and agricultural labor. Fought out against the current backdrop of state bilingual education, the main linguistic battle concerns the merits of regional bilingualism in Spanish and English (pp. 299-304). The educational battle goes to the struggle against segregation in schools and public facilities (pp. 304-09). An even more pitched battle relates to the employment struggle of Mexican immigrant agricultural labor in the fields of the Southwest, especially California. Inspired by the anti-immigrant impulse labeled "the new nativism" by Gilbert Paul Carrasco, the exploitation and expulsion of immigrant labor enmeshes the Mexican and Filipino farmworker movement in state and agribusiness disputes over land, wages, and working conditions (pp. 310-19).

The cultural stigma marring Mexican American identity also sullies Puerto Ricans. As a territory acquired in the Spanish-American War of 1898, Puerto Rico suffers a colonial relationship with the United States.³³ American colonial rule of Puerto Rico, the editors explain, shapes legal, political, and social status inside the territory. Rationalized by the ideology of expansion and justified by the language of conquest, Puerto Rico's subordinate status is inscribed in both legislation and adjudication. Although Congress granted United States citizenship to Puerto Ricans pursuant to the Jones Act of 1917 (p. 341), Puerto Rico's commonwealth status deforms the meaning of that citizenship for voting and equality purposes given that the territory holds no sway in Presidential elections and commands no congressional representation (p. 347). Commonwealth status also makes possible disparate treatment of federal entitlements.

D. Asian Americans

Asian Americans, the editors contend, likewise suffer discrimination in private and public spheres of American life. Because immigration connects both spheres, much of the focus of the Asian American chapter of *Race and Races* is on immigration law. The editors point to the common patterns of racism against all Asian Americans in immigration law despite the historical, cultural, and linguistic diversity of the Chinese, Japanese, Koreans, Filipinos, Asian Indians, Vietnamese, Laotians, and Cambodians. Even a cursory examination of the history of labor immigration shows signs of race-based exclusion and resentment, initially against the Chinese, as illustrated by the ban on Chinese testimony in criminal and civil cases enacted in *People v. Hall* (pp. 370-73),³⁴ and later against the Japanese in equally virulent fashion. That exclusionary history triumphed over

33. Under the 1898 Treaty of Paris (p. 327).

34. 4 Cal. 399 (1854) (prohibiting admissibility of Chinese testimony against a White defendant in criminal trial). The California legislature repealed the ban in 1872 (p. 374).

safeguards such as civil rights protections specifically negotiated by the Chinese government on behalf of its subjects in the Burlingame Treaty of 1868 (p. 374) and also over the more general protections of the Civil Rights Act of 1870 (pp. 374-75). As a consequence, the Chinese faced intensifying racism not only from states, exhibited in the corporate employment restrictions of Article XIX of the California Constitution of 1879 (pp. 376-77),³⁵ but also from anti-Chinese hate groups (pp. 375-76). State-sponsored racism, the editors maintain, infected laundry, licensing, and building code ordinances. The discrimination inherent in these economic regulations, vividly displayed in *Yick Wo v. Hopkins* (pp. 378-81),³⁶ was surpassed by the Chinese Exclusion Act of 1882 (pp. 382-84), curtailing the right to immigrate, and the Scott Act of 1888 (p. 384), restricting the right to return. This brazen discrimination was repeated by the invidious enactment of the 1892 Geary Act (pp. 388-90), the first race-based internal passport system in the United States. Federal courts endorsed the exercise of congressional power both to regulate the status of Chinese laborers (pp. 384-88)³⁷ and to control the flow of Chinese immigration (pp. 390-95),³⁸ thereby condoning the nineteenth-century practice of public discrimination.

Although the first significant immigration of Japanese Americans occurred in 1885, later than that of the Chinese, they also suffered from the enactment and enforcement of discriminatory legislation. Alien Land Laws, such as the 1913 California Alien Land Law (pp. 398-99), and the Washington Alien Land Law discussed in *Terrace v. Thompson* (pp. 401-04),³⁹ restricted aliens' ability to own or transfer land to those eligible for citizenship. By effectively prohibiting Japanese Americans from qualifying for citizenship, such laws inhibited the social assimilation and economic integration of the Japanese (pp. 401-04). The double blow of *Takao Ozawa v. United States* (pp. 435-37),⁴⁰ upholding legislation rendering Japanese Americans ineligible for citizenship, and the World War II curfew and internment orders imposed upon those of Japanese ancestry residing along the West coast (pp. 406-12), badly undermined Japanese citizenship status.⁴¹ These acts established the precursor for anti-Asian

35. CAL. CONST. of 1879, art. XIX (invalidated 1880) (prohibiting employment of Chinese by California corporations).

36. 118 U.S. 356 (1886) (overturning conviction under discriminatory municipal ordinance for equal protection violation of the Fourteenth Amendment).

37. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (recognizing the plenary power of Congress under the Scott Act of 1888 to prohibit from entering the United States Chinese laborers who had departed before its passage).

38. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (companion cases) (affirming dismissal of writs of habeas corpus issued on behalf of Chinese laborers arrested for violations of the Geary Act's internal passport system).

39. 263 U.S. 197 (1923).

40. 260 U.S. 178 (1922).

41. See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the validity of federal curfew orders).

violence. Rooted in the racial hierarchy of national identity and the attribution of "foreignness," violence against Asian Americans continues unabated, as demonstrated by the 1992 findings of the U.S. Commission on Civil Rights (pp. 397-428).

III

RACE, LAW, AND CITIZENSHIP

Race and the forces of exclusion animating the law of immigration frame the notion of citizenship. Construed in terms of both marked and unmarked groups, citizenship embroils the concepts of democracy and equality, sometimes erupting in violence. Race and violence permeate the legal history of American citizenship, coloring the grant and denial of status, and the caste of inclusion and exclusion. Historical studies, the editors contend, confirm the privilege of color in the imagery, transparency, and invisibility of the status of Whiteness and the caste of otherness.⁴² The editors show that White color consciousness and supremacy gave rise to the White-cabined citizenship eligibility of the Naturalization Act of 1790 (p. 429) and to the court-determined citizenship controversies over light-skinned non-European qualification in *In re Ah Yup* (Chinese) (pp. 430-32),⁴³ *Takao Ozawa v. United States* (Japanese) (pp. 435-37),⁴⁴ and *United States v. Bhagat Singh Thind* (Asian Indian) (pp. 437-40).⁴⁵ Fanned by class conflict, that sense of supremacy also produced violence. The editors link conflict and violence to the ideology of White racial purity. The belief in racial purity, they explain, motivated an anti-immigrant sentiment toward the early twentieth-century European immigration of the Irish, Italians, and Jews (pp. 445-53), and more recently toward Vietnamese Amerasian refugees (pp. 441-44). For James Barrett and David Roediger (pp. 445-52), the immigrant flight to Whiteness stems from an attempt to escape the demeaning shadow of race and the corresponding danger of violence incited by the nationalistic fervor of Manifest Destiny and the scientific supremacy of Social Darwinism. The same flight from the color line encourages the effort to emulate White transparency in Black-for-White passing.

In addition to the color-coded imagery of Black-for-White passing, the editors suggest that White privilege manifests itself through the prevalence of a White aesthetic in art and literature. The cultural regulation of racial caste under the gaze of this aesthetic mimics and reinforces social hierarchy. Thomas Ross (pp. 465-68) and Linda Ammons (p. 468) decipher

42. See CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

43. 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104).

44. 260 U.S. 178 (1922).

45. 261 U.S. 204 (1923).

elements of racial hierarchy in the image of White innocence. D. Marvin Jones (pp. 469-70) unearths the same properties in metaphor and story. The editors imply that these properties insidiously grip the popular imagination, corroding visions of the racial self and other, and thereby deforming the classical liberal conception of personhood and mutuality. Intuitively appealing, this implication garners weak empirical support from the text of *Race and Races*. The editors, for example, decline to explicate the sociology of the popular imagination, estimate the White aesthetic's corrosive effect on the racial self, or measure its disparate impact on the public and private spheres of the self. With sparing elaboration and evidence, they seem to reiterate the axiom of the Black-White binary paradigm of race and extend its reach to the arts. But the cultural inscription of race requires more than broad-brush engrafting, especially in the performing and visual arts. To be sure, White metaphor may be tied to the racial pride, nationalism, and supremacy of the White power movement documented by Elinor Langer's study of American Neo-Nazi groups (pp. 479-484) and Mark Mueller's research on internet hate groups (pp. 485-86). This tie is also displayed in the racial paranoia of on-line newsgroups (pp. 486-88). That cultural link, however, may be frayed by the dissonance of racial commitment and betrayal illustrated by Noel Ignatiev's conception of "race traitors" (pp. 489-93). The race traitor idea nicely illuminates the contested role of Whites in the struggle for equality. Both Frances Lee Ansley (pp. 493-97) and Barbara Flagg (497-99) point to the centrality of identity politics, racial allegiance, and White race consciousness to that struggle.

The editors take up the concept of racial equality as it applies to both individuals and groups. Starting from the liberal framework of equality, embodied in current Fourteenth Amendment Equal Protection Clause jurisprudence, they point to the requirement of "comparing individuals" and "ensuring that likes are treated alike" (p. 500). Under this framework, they continue, individuals are reduced to atomistic entities "absent any relation to others" (p. 500). Reductionism of this sort, they contend, makes it appear that the harm of racism is confined to "disparate individuals unconnected by race or by the other categories that identify and connect people" (p. 500). Well-known to critical race theorists,⁴⁶ this critique of the liberal subject and individual harm opens the door to an enlarged concept of group and community identity. The editors believe that a more expansive concept of identity can be found in a postmodern vision of personhood which "recognizes that individuals are more complex than an identifying trait" (p. 501). More accurately conceived, individuals "exist as part of larger groups—races, families, genders, sexual orientations, and many other vectors that comprise identity" (p. 501). Decontextualizing the

46. See BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 1-65 (1998).

individual from this identity foundation, the editors insist, results in not only "unfair treatment," but also "a failure of equality" (p. 501). That insistence, couched within a critique of the individualized orientation of equal protection remedies, fails to resolve the tension spurred by individual and group competition over the scope of protection afforded by constitutional equality. Likewise, it fails to settle the conflicts between individual equality and community sovereignty or self-determination. The editors appear to attribute this twin failure to the contested meaning of the Equal Protection Clause, its racialized constitutional origin, and its embattled development under the neutral formalism of color-blind doctrinal rationality. The inequitable regulation of river port pilots in *Kotch v. Board of River Port Pilot Commissioners*⁴⁷ shows the thinness of neutral rationality (pp. 506-09). The Japanese exclusion order approved in *Korematsu v. United States*⁴⁸ and the Mexican jury exclusion policy struck down in *Hernandez v. Texas*⁴⁹ demonstrate its unstable logic (pp. 511-19).

To test this logic, the editors introduce a number of readings criticizing the color-blind tenor of Equal Protection jurisprudence. For Reva Siegel (pp. 520-33), the logic of constitutional scrutiny of racial and gender classification is status-enforcing. Even when the classification embodies a facially neutral policy, it incorporates existing hierarchical values and renews historical patterns of racial and gender inequity. Stephanie Wildman (pp. 534-35) finds these values and patterns embedded in the rights discourse of anti-discrimination statutes regulating workplace equality. Parsing the application of Title VII of the 1964 Civil Rights Act, she confronts persistent strands of bias that survive in the form of unacknowledged privilege. Examples of court-condoned privilege-based employment policies which operate differentially according to the employee's race include the workplace grooming requirement prohibiting "corn rows" in *Rogers v. American Airlines* (pp. 536-38)⁵⁰ and the English-only workplace speech requirement in *Garcia v. Spun Steak Company* (pp. 541-48).⁵¹ A selection by Mari Matsuda (pp. 551-61) shows how privilege and power may also hinge, though less overtly, on workplace assumptions about the linguistics of "standard" and deviant accents. Overcoming privileged positions in the workplace, the editors admit, risks putting anti-subordination and race-conscious principles at variance. Of necessity, workplace elevation in the

47. 330 U.S. 552 (1947) (sustaining Louisiana river pilotage selection system based on practice of nepotism).

48. 323 U.S. 214 (1944) (upholding constitutionality of 1942 civilian exclusion order directed at persons of Japanese ancestry).

49. 347 U.S. 475 (1954) (reversing criminal conviction because of systematic exclusion of persons of Mexican descent from service as jury commissioners, grand jurors, and petit jurors).

50. 527 F. Supp. 229 (S.D.N.Y. 1981) (dismissing statutory claims of race and sex discrimination in enforcement of airline grooming policy).

51. 998 F.2d 1480 (9th Cir. 1993) (rejecting employment discrimination challenge of bilingual workers to English-only workplace speech policy).

form of race-conscious hiring and promotion clashes with the anti-subordination principle of non-hierarchical treatment. Coupled with the ascendant disparate treatment jurisprudence of *Adarand Constructors, Inc. v. Peña* (pp. 564-70)⁵² limiting the ambit of affirmative action in the workplace, that clash threatens to weaken the search for equality across language, accent, hair style, dress, and skin color and, moreover, to undermine multiracial representation in the workplace (pp. 500-79).

In the public sphere, infused by democratic norms of participation, equality of citizenship and representation are closely allied with the idea of voting. The editors record the historical struggle to realize this idea against exclusionary practices endorsed by law, and enforced by state officials and vigilante groups. Underscoring the importance of voting to equality, they emphasize the role of law and legal rights vindication in strategic combination with political organizing and voter registration (pp. 588-89). Without this combination of advocacy and organizing, the editors fear the continued disenfranchisement of communities of color by new methods, as shown in the Supreme Court's acceptance of a transfer of authority away from recently elected Black county commissioners in *Presley v. Etowah County Commission* (pp. 618-30).⁵³ Aroused by Robert Chang's account of Asian American exclusion from avenues of political participation, they call for the revitalization of democratic participatory norms and for heightened practice in the "training for democracy" on behalf of both individuals and groups (pp. 614-45).

Plainly, education stands as an essential part of democratic training. For the editors, education is also an area where the state, the market, and the law of property entwine with the geography of race. Using Margalynne Armstrong's study of race and property values under conditions of entrenched segregation as a starting point (pp. 647-52), they find the roots of educational inequality in the racialization of space caused by residential segregation and housing discrimination. To demystify the natural order of racialized space, the editors track the development of segregation in public school education, culminating in the condemnation of *Brown v. Board of Education* (pp. 675-82).⁵⁴ The hardening of this racial order in the post-*Brown* era sheds doubt upon the efficacy of group-oriented remedial strategies as the best means to ensure high-quality desegregated education.⁵⁵ The

52. 515 U.S. 200 (1995) (applying strict scrutiny to a minority-preference program in federal highway construction).

53. 502 U.S. 491 (1992).

54. 347 U.S. 483 (1954) (holding that segregation of children in public schools solely on the basis of race deprives the minority group's children of equal educational opportunities guaranteed by the Fourteenth Amendment).

55. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 107-55 (1991); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993).

Supreme Court's failure to fashion an appropriate remedy under the Fourteenth Amendment for disparate state systems of public school financing in *San Antonio Independent School District v. Rodriguez* (pp. 686-95)⁵⁶ and a similar failure to address residential patterns of segregation induced by "white flight" in *Missouri v. Jenkins* (pp. 697-708),⁵⁷ deepens that sense of doubt. Commenting on the futility of litigation in the face of intractable segregation and educational inequality, Drew Days challenges the very desirability of integration, particularly for Black males (pp. 710-22). The erosion of the integrative ideal corresponds to a growing repudiation of racial classifications in education and a move toward race-neutral admission procedures exemplified by the recent federal court retreat from racial preferences to promote law school diversity in *Hopwood v. State of Texas* (pp. 725-42).⁵⁸ A disturbing turn, this retreat may signal a shift in the progress toward a more inclusive sense of citizenship and a more sensitive racial aesthetic in American culture and society. Much of that progress hinges on an enhanced appreciation of racial identity and group harm and on an enlarged commitment to the public and private equality of democratic community.

IV

RACE, CULTURE, AND SOCIETY

The advance and retreat of racial community is also visible in culture and society. Although the translation of race from politics to culture and society is imprecise, its lexicon of color-coded discourses infuses everyday life in the popular mind and in the law. The editors explore the indefinite connection between race, racism, and popular culture by compiling the demeaning artifacts of outsider imagery and narrative that construct the daily life of racial experience. Richard Delgado and Jean Stefancic assemble the artifacts of group experience from popular narrative (pp. 959-70), showing how racial groups are similarly cast as outsiders. Margaret Russell collects like images from modern film (pp. 970-73). The racial stereotypes both exhibited and informed by cultural caricature extend beyond the Black figure to infect the aesthetic of "foreignness" governing images of Asians Americans (pp. 974-76), the "quaint" images of American Indians as vanished or strangely primitive people (pp. 991-94), and even the mythology of Pocahontas (pp. 994-96). Linda Ammons's look at the credibility of Black women's trial testimony demonstrates how these racial stereotypes can play out in the courtroom (pp. 985-88). Combating caricature at trial⁵⁹ and in the arts, as Yolanda Broyles-González observes in her account of

56. 411 U.S. 1 (1973).

57. 515 U.S. 70 (1995).

58. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

59. See Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001).

the Farm Worker's Theater, depends on the mobilization of countervailing power, racial memory, and community identity (pp. 976-79). According to two pieces by Richard Delgado, it also rests on constraining racist impulse through the formality of legal process (pp. 997-1001) and hate speech regulation (pp. 1013-16).

For many, the editors admit, "free speech is a necessary condition for community, solidarity, and self-fulfillment . . ." (p. 758). Moreover, free speech historically served the civil rights ideal by safeguarding minority political protest, oftentimes with mixed results.⁶⁰ Against this robust history of free speech guarantees to civil rights protest, the call for hate speech regulation sounds widespread alarm among both civil libertarians and civil rights activists,⁶¹ even when limited to campus racial epithets. Unlike restrictions based on common law or statutory libel,⁶² hate speech prohibitions rooted in the presumption of identity and community harm encounter both judicial reluctance⁶³ and majority-based popular resistance, notwithstanding the doctrinal appropriateness of tort law in defamation. To the editors, constitutionally-tailored hate speech regulation warrants sympathy and enactment. Paradoxically, less speech may advance the denigration of cultural identity and pluralism under "Official English" legislative initiatives (pp. 835-56).⁶⁴

For law, the paramount forum for speech is the oral, written, and social text of lawyering. The cultural denigration of the Black image and the social subordination of the Black voice is sharply etched in the law and lawyering of the criminal justice system. In the arena of crime and punishment, Juan Perea's astutely observed binary paradigm of White innocence and Black guilt still largely prevails. This racialized paradigm survives in

60. Compare *Cox v. Louisiana*, 379 U.S. 536 (1965) (pp. 758-64) (throwing out breach of the peace convictions of civil rights sit-in protestors on First Amendment grounds), with *Adderley v. Florida*, 385 U.S. 39 (1966) (pp. 764-68) (affirming convictions for trespass of protestors who marched onto the grounds of a jail to protest the arrest of civil rights demonstrators), and *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (pp. 768-75) (upholding contempt sanctions against protestors who defied an arguably unconstitutional anti-assembly injunction).

61. See Stephen G. Gey, *The Case Against Postmodern Censorship Theory*, 125 U. PA. L. REV. 193 (1996).

62. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (affirming criminal conviction under Illinois libel statute); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (reversing state damage award under Alabama libel law for violation of First and Fourteenth Amendment freedoms of speech and the press).

63. Compare *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining administrative enforcement of University of Michigan policy prohibiting hate speech because it violated the First Amendment), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (proclaiming St. Paul anti-bias ordinance facially unconstitutional under the First Amendment), with *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (approving Wisconsin penalty-enhancement sentencing statute punishing bias-inspired conduct).

64. See *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (p. 848) (vacating challenge to Arizona official English constitutional amendment as non-justiciable controversy); *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (pp. 849-57) (concluding that Arizona official English constitutional amendment violates First Amendment free speech and Fourteenth Amendment equal protection rights).

spite of the recurrent White violence against Asians and Latinos (pp. 1019-23), the pervasive evidence of race-motivated police brutality (pp. 1028-34), and the disproportionate rates of Black male arrest and imprisonment (p. 1035). Like the capital sentencing irregularities in *McCleskey v. Kemp* (pp. 1076-87),⁶⁵ these disparities may be attributable to racially neutral policies, social norms, and cultural differences. Yet their unbroken continuity implies something more than neutral happenstance. Indeed, the enduring legacy of race and crime, either in the differential prosecution of violence against women of color mentioned by Kimberlé Crenshaw (pp. 1026-28), or in the racially based jury nullification reported by Paul Butler (pp. 1045-47), lies in the ineradicable and seemingly evanescent quality of bias in private offices, courtroom halls, and public streets.⁶⁶

A similar bias, obdurate but elusive, marks the site of sexuality and the family in American law. Traditionally thought of as a private realm sequestered from the state, sexuality in communities of color, especially in Native American and slave contexts, is heavily regulated through both cultural and governmental encroachment. Under antebellum and postbellum regimes, the editors note, legal doctrines and evidentiary burdens bent to accommodate White and Black hierarchy. For example, in *Story v. State* (p. 886-89),⁶⁷ a White woman's reputation for prostitution was not considered evidence of unchastity admissible to challenge her testimony that she was raped by a Black man. Darren Hutchinson (pp. 890-93) and Catharine MacKiunon (pp. 895-97) refer to the ongoing lack of juridical accommodation of difference in the marginalized treatment of gays, lesbians, and sexual atrocity victims, specifically showing how the lack of police interest in, and judicial awareness of, sexualized violence is exacerbated when victims are members of minority groups. The editors see some signs of progress in recent federal court decisions recognizing sexual assault as a basis for a genocide claim according to international law and international war crime tribunals, shifts that may signal the opening of gender hierarchies in international law. They also look to the surprisingly recent repudiation in American law of antimiscegenation statutes (pp. 909-18)⁶⁸ as a hopeful indication of a loosening of hierarchy-bound racial status in the field of interracial intimacy. In the realms of reproduction and the family, however,

65. 481 U.S. 279 (1987) (rejecting constitutional complaint of race-infected capital sentencing determinations under the Fourteenth and Eighth Amendments).

66. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997) (affirming trial court issuance of preliminary injunction under California anti-gang public nuisance statute).

67. 59 So. 480 (1912).

68. Compare *Loving v. Virginia*, 388 U.S. 1 (1967) (p. 914-18) (striking down Virginia miscegenation statute under Equal Protection and Due Process Clauses of the Fourteenth Amendment), with *Roldan v. Los Angeles County*, 18 P.2d 706 (Cal. App. 1933) (p. 909-11) (upholding California miscegenation statute).

neither low-status women nor women of color enjoy broad respite from state intervention and the discourse of subordination.⁶⁹

V

RACE AND REFORM

The editors' exegetical reading of the sociolegal text of race in American law and society concludes with a meditation on the role of law and legal rights in obtaining reform. Canvassing multiple sites of racial contestation, they urge varied methods of resistance in law, lawyering, and political organizing. Resistance, they suggest, may spring from the logic of law and the rights-based commitment of the reform-minded lawyer. This optimistic stance, encouraged by Rennard Strickland's defense of Anglo-American jurisprudence in tribal courts (pp. 1092-96), gathers strength from the inheritance of civil rights statutes and grass-roots movements, like that of Dr. Martin Luther King, Jr. (pp. 1097-1104), which attack White supremacy by boycott and nonviolent action.

To their credit, the editors are alert to the creative tensions accompanying lawyer-engineered social change. Those tensions are inherent in coalition work. To mitigate the tensions spawned by inter-group conflict, they recommend interracial conflict management (pp. 1109-14). Effective conflict resolution hinges on the recognition of common interests and stakes. The White stake in this multiracial outcome, they assert, comes from linking up common systems of oppression and disclosing shared goals of community uplift. Yet as Derrick Bell and Richard Delgado comment, that stake is of uncertain measure. Absent a commitment to equality and racial healing, the divergent experiences and realities of race inhibit meaningful cross-racial discourse, even given the pressures of assimilation. Consequently, the editors look inward to the classroom and to the legal profession for opportunities to build antiracist coalitions and interracial communities (pp. 1091-1154).

CONCLUSION

The editors' inward turn to a classroom community and to a legal practice accepting of "an obligation to learn about race and strategize about how it could affect each case" (p. 1154) burdens *Race and Races* with the onus of prescription in pedagogy and advocacy. However praiseworthy, the text will not bear that heavy onus. Its principles of criticism leave us normatively unguided in the classroom and floundering in the vague context of community. Its justice mandate lacks an algorithm to weigh benefit

69. See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51 (1997).

against harm or to reconcile the competing claims of the individual and the group. Its reliance on racial intuition misplaces faith where skepticism belongs.

To render prescriptive counsel properly, the editors must confront the tension dividing modern and postmodern modes of analysis in the critical race movement.⁷⁰ Perhaps wisely, they leave that tension unmediated. Accordingly, they declare commitments to neutrality and race-consciousness. They condemn and exploit the hegemonic logic of law. They ridicule and embrace formalism and process values. They celebrate multiracial identity and assail the ill-fitting methods of advocacy and adjudication. They deplore the limitations of rights-consciousness and agitate for its renewal. Like others devoted to race-conscious change in the law school curriculum⁷¹ and its clinics,⁷² and in the profession⁷³ and its ethos,⁷⁴ they labor in the ambiguity of this long moment of transition. The duration of this transition, its breadth, and its outcome are uncertain. The comfort of certainty comes only from the realization that race will continue its hold upon law and society, inciting rancor and inspiring reconciliation. Out of extraordinary devotion, the editors have carved a far-reaching path to reconciliation and respect in a community of race. We should be grateful for their work and hard-earned leadership. We should hope they do not grow weary.

70. See Anthony V. Alfieri, *Black and White*, 85 CALIF. L. REV. 1647 (1997) (book review).

71. See Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academics*, 75 N.Y.U. L. REV. 308, 315-40 (2000); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989); Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985, 1992-2010 (2000).

72. See Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997); Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423 (1998); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65 (1997); see also Jon C. Dubin, *Faculty Diversity as a Clinical Education Imperative*, 51 HASTINGS L.J. 445 (2000); Lucie E. White, *The Transformative Potential of Clinical Legal Education*, 35 OSGOODE HALL L.J. 603, 605 (1997).

73. See Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms: An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996); see also David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15 (1999); David B. Wilkins, *Social Engineers or Corporate Tools: Brown v. Board of Education and the Conscience of the Black Corporate Bar*, in RACE, LAW AND CULTURE 137-69 (Austin Sarat ed., 1997); David B. Wilkins, *Two Paths to the Mountaintop?: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993).

74. See David B. Wilkins, *Beyond "Bleached out" Professionalism: Defining Professional Responsibility for Real Professionals*, in ETHICS IN PRACTICE 207-39 (Deborah L. Rhode ed., 2000).

Book Review

Teaching by the Book

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.

Edited By Juan F. Perea,[†] Richard Delgado,^{††} Angela P. Harris,^{†††} and
Stephanie M. Wildman.^{††††}

St. Paul: West Group, 2000. Pp. xlix, 1171. \$60.00 cloth.

Reviewed by Margalynne Armstrong[‡]

This review of *Race and Races* presents a pragmatic perspective, discussing how the casebook performed in the classroom. I have twice assigned *Race and Races* as the primary text in three-unit seminars. I first taught the materials while in manuscript form (p. v), and then used the book in its first year of publication. Having taught similar courses with other materials and texts, I conclude that, although the text is not flawless, using this book helped the course to reach new heights. The editors' racially inclusive and multidisciplinary presentation excited the students and encouraged thoughtful and respectful discussion. Student appreciation of the book was extraordinary. One remarked, "This is the only law school textbook that I intend to keep after I graduate."

Race and Races emphasizes the role of law in creating racial hierarchies in the United States. Although the editors of the text state that they aspire to "present race and racism in a manner that corresponds to the racial complexity of United States society" (p. 1), their achievement is actually more focused and manageable. Given that race is constructed of "an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle" (p. 59),¹ a text that attempts to mirror the complexity of race and racism in this society has for its subject matter an unmanageable, incoherent, and perpetually transforming phenomenon. But the book centers on law's role in the formation of races and racism, and

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1. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 55 (2d ed. 1994).

this theme of legal intervention in the construction of race in the United States provides a coherent core. The text represents significant progress in the important project of reckoning law's role in constructing and sustaining the racial hierarchies still prevalent in our society.

I

RACE AND LAW COURSES IN OUR PECULIAR INSTITUTIONS

Race and Races helpfully addresses many of the particular challenges that often confront Race and Law courses. These courses sometimes encounter institutional structures or consumer (that is, law student) concerns that prohibit schools from offering these courses or that discourage student enrollment.² First of all, not every institution among the 164 Association of American Law Schools ("AALS") member law schools chooses to offer Race and Law Seminars. In the 2000-2001 AALS Directory of Law Teachers, fewer than fifty law professors self-reported themselves as teaching this type of seminar.³ Furthermore, even when the course is offered, students may not choose to enroll in the course or may be unable to schedule the course even if they so desire. My various race seminar sizes have ranged from eighteen to thirty (after teaching thirty students I determined that it was important to cap the seminar's enrollment at twenty), and students are frequently on the waiting list for the seminar.

A law student who graduates without taking a course on race and law might leave law school having seen race presented as relevant to law only

2. At Santa Clara University School of Law, the course is offered as a seminar in Contemporary Legal Theory. The first time I used the book, the course was described as Critical Race Theory; the second time it was offered as Race and the Law. The Contemporary Legal Theory label is, in and of itself, another story. When SCU began to offer "critical perspective" seminars ten years ago, such as Feminist Jurisprudence, Critical Race Theory, and Law and Sexuality, students expressed some concern about how having these course titles on the student transcript would look to prospective employers. The Contemporary Legal Theory title was created to address these concerns. This generic title would also allow the seminar professors to change course focus without having to resort to formal course addition procedures. For example, Critical Race Theory could instead be offered as Race and Law at the professor's discretion. Eventually even Contemporary Legal Theory became controversial. In 1998 three professors who wanted to teach Feminist Jurisprudence, Critical Race Theory, and Law and Sexuality under the Contemporary Legal Theory Seminar offerings in the 1998-99 academic year were informed that this would be too many CLT offerings and that one of the seminars could not be offered. Memorandum from Mack A. Player, Dean, Santa Clara University School of Law School, to Professors Margalynne Armstrong, June Carbone, and Peter Kwan (March 26, 1998) (on file with author) (noting that "three seminars on the same basic theme are difficult to justify in terms of resource allocation and student needs" and requesting the recipients to substitute another course for one of the Contemporary Legal Theory offerings). Feminist Jurisprudence has not been offered since 1998, having been replaced by Contemporary Legal Theory and Women, Technology and Law. Law and Sexuality was subsumed into one of our Jurisprudence courses that included an extensive exploration of Queer Theory alongside other schools of legal thought. Only one section of Contemporary Legal Theory, Asian Americans and the Law, was offered during the 2000-2001 academic year.

3. This number was obtained by counting the seminars identified as Race and Law, Race and Racism in the Law, or Critical Race Theory, or as specific racial groups and the law, under the Civil Rights Course listings in the 2001 AALS Directory.

in constitutional cases and civil rights statutes. Even in those areas the analysis of race is inadequate. The standard constitutional law course often omits a number of issues in which race played a predominant role, such as slavery⁴ and the constitutional crisis that arose from the *Worcester v. Georgia* decision, in which the Supreme Court tried to insulate Indians from state sovereignty (pp. 202-07). Fourteenth Amendment coverage lumps together *Plessy v. Ferguson* (pp. 142-47), *Yick Wo v. Hopkins* (378-81), *Korematsu v. United States* (pp. 511-16), and *San Antonio Independent School District v. Rodriguez* (pp. 686-95), with little or no examination of the specific racial dynamics that spawned these cases.⁵ The bundling leads to a one-size-fits-all mentality that analyzes race with no reference to factual and societal context. In this way, typical constitutional law courses structurally replicate the color-blindness discourse that permeates the current Supreme Court's Fourteenth Amendment jurisprudence. The expurgation of race from cases that deal with racial discrimination creates a void that distresses many law students.

A number of students enroll in Race and Law seminars hoping, in their second or third year of law school, to at last focus on some of the issues of justice that inspired them to enroll in law school in the first place. Some students simply seek a course in which their life experiences and daily concerns may be acknowledged, articulated, and affirmed. Race and Law is a class in which the law's legacy of differential racial treatment is finally studied for its own content. Thoughts and reactions about the law's racial impacts and implications that have been suppressed or discounted as irrelevant in other classes can at last be developed and explored in some depth.⁶ *Race and Races* is a useful text because it tackles a number of the difficulties that most law teachers face when they offer classes on Race and Law. All students have personally experienced the text's subject matter of race at some level, but often from widely differing perspectives. These varying perspectives are reflected in the expectations that students bring to a course on Race and Law. As adult inhabitants of the Americas, we each bring to the seminar our own matrix of cognition and understandings relating to race that have been developing since our childhood. These pre-conceptions about the subject matter differ sharply from the mindset with

4. See Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHL-KENT L. REV. 1087, 1090 (1993).

5. *Plessy v. Ferguson* held that a state statute segregating train passengers by race did not violate the Fourteenth Amendment's equal protection guarantee. The decision effectuated the wholesale segregation of African Americans in the southern and border states for the first half of the twentieth century. *Korematsu v. U.S.* upheld the Executive Order and Act of Congress that authorized military commanders to intern Japanese Americans during World War II. *San Antonio School District v. Rodriguez* sustained a state public education financing scheme that allocated fewer funds to poorer school districts, rejecting an equal protection challenge to wealth-based legal classifications.

6. See Margaret Montoya's description of what is considered irrelevant to the prevalent legal discourse when discussing *People v. Chavez* in her first-year criminal law class (pp. 1148-49).

which students enter many of their other courses. We have lived most of our lives knowing something of race, while few of us came to civil procedure, contracts, or torts with a similar sense of knowledge. The Race and Law course is also unusual among law school offerings because its subject matter and its text are not generally viewed as involving neutral principles. This is a class scrutinizing doctrine for its very non-neutrality and requiring students to examine the course materials for insight into how prejudices become embedded in law through the very specific frailties of the law's human framers.

The *Race and Races* text confronts these problems by immediately expanding or even exploding the understandings of race that most students bring to the course. Its purpose is to build a common ground and present core concepts, which the editors will refer to throughout the text. The first chapter, "Defining Racism and Race" (pp. 5-90), jolts the reader into confronting the complexity of the commonplace by presenting a broad array of perspectives about the phenomenon of race. Historical, international, psychoanalytic and psychological, political, and anthropological views are all presented. Some of my students found this unsettling, complaining that the text assumed they had background in these various areas. But the goal of the first chapter is to get them to think outside of their previous conceptions and to understand that race scholars must analyze the subject using a variety of tools. At the same time, this chapter provides a basic vocabulary and introduces concepts that enable the readers to process the contents of the upcoming chapters with some sophistication.

Later chapters continue to develop this multidisciplinary understanding of race by juxtaposing sociological, historical, and political materials with legal texts and documents. Including political documents such as President Andrew Jackson's first annual message to Congress of 1829 (pp. 188-90) and the 1961 Declaration of Indian Purpose (pp. 221-23) provides rich historical and political context for examination of the role of law in the United States Indian policy of the nineteenth and twentieth centuries. The section on Mexican Americans (pp. 253-326) features an excerpt from Reginald Horsman's book *Race and Manifest Destiny* (pp. 254-58) that is essential to understanding the forces behind the treaty excerpts, state constitutional provisions, and land grant cases that follow. In contrast to traditional law school texts, which barely acknowledge law's contextual underpinnings,⁷ *Race and Races* empowers students to understand law with much deeper insight.

7. See David Benjamin Oppenheimer, *Martin Luther King*, *Walker v. City of Birmingham*, and *the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993). Law students are sometimes taught cases such as *Walker v. City of Birmingham* as illustrations of abstract legal principles totally divorced from their historical and social underpinnings. *Id.* at 792.

The foundations the editors lay in the first chapter help students to understand the theme, found throughout the book, that lawmakers' skill at exploiting the psychological and emotional infirmities of the general public buttressed their abilities to manipulate race and racial status. Legally sanctioned Indian conquest and African slavery in an America ostensibly committed to democracy and freedom are not logically compatible; widespread acceptance of these anomalies required an entire system of rationalization. In Chapter Two (pp. 91-172), the editors illustrate the systemic foundations of the legal oppression of persons of African descent by presenting excerpts from Benjamin Franklin's *Observations Concerning the Increase of Mankind* (pp. 98-99) and from Jefferson's *Notes on the State of Virginia*:

In general, their existence appears to participate more of sensation than reflection . . . Comparing them by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites, in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless and anomalous (p.101).

These selections are all-too-perfect examples of Albert Memmi's model of the strategies used in racist and imperial discourse described in an excerpt from Robert Williams's *Documents of Barbarism* (p. 26). This model stresses the real or imaginary differences between the racist and his victims; assigns values to these differences, trying to make them absolute; and justifies any aggression or privilege. Jefferson's writings propound a physiology of essential difference and absolute significance that serves to justify the aggression and oppression involved in enslaving Africans and expelling emancipated Blacks from White American society. Similar rhetoric infuses a number of the legal texts that appear in *Race and Races*, such as Article XIX of the 1879 California Constitution (p. 376) and *U.S. v. Bhagat Singh Thind* (p. 437).⁸ As a teaching tool to make the connections between the first and later chapters explicit, I assigned a short written exercise requiring students to apply the Williams and Memmi analysis to the legal text of their choice. After this assignment, the students frequently applied these introductory materials without further prompting from me.⁹

8. 261 U.S. 204 (1923).

9. Student application of these ideas was apparent in several of the final papers submitted for the class. Examples include a paper wherein a student applied the writings of Iris Marion Young's included in the section on "Racism and Theories of Oppression" in the first chapter of *Race and Races* (pp 14-15). The student used Young's theories to analyze a report by the National Telecommunications and Information Administration concerning race-based inequality of access to technology. Carla De Silva, *The Digital Divide: Is It the Modern Paradigm for Oppression in the New Millenium?* (May 2000) (unpublished course paper) (on file with author). Another student paper applied Linda Hamilton Kreiger's work on cognitive bias introduced in *Race and Races* (pp. 33-37) to examine the role of race in arguments directed to juries in criminal cases. Nicole Lapcevic, *The Use of Race as a Persuasive Tool in Criminal Jury Trials* (May 2000) (unpublished course paper) (on file with author).

The *U.S. v. Bhagat Singh Thind* case appears in *Race and Race's* sixth chapter, entitled "Race, Racism and Whites: The Case of Whiteness" (pp. 429-99). The inclusion of this chapter is important for several reasons. First, it compels readers to recognize that White people are "raced" and helps move away from whiteness as the presumptive norm. Secondly, it examines the longstanding and wide-ranging legal significance of being classified as White in the United States. The chapter shows that racism in law consists of more than discrimination against, or protection of, non-White races. It describes the role of law in the creation and protection of whiteness. Moving beyond White transparency is a great tool for enabling all students to feel more at ease in Race and Law courses. Rather than assigning whiteness silent power and responsibility for creating racist laws, students can see that whiteness is also a creation of racial formation.

My complaints about the book are few. As with all casebooks, an instructor must exercise professorial prerogative and cut materials or assign them out of order. We simply could not cover the entire book. I assigned the first nine chapters and the final chapter, "Responses to Racism," and allowed the students to vote to select two additional chapters.¹⁰ Reading the racial category chapters in succession became tedious, so in the future I plan to intersperse assignments from the later, topical chapters throughout the semester.

A textbook is a rather static format for capturing a subject in constant evolution, but it is the medium of choice for the law school classroom. The editors try to escape the tendency of such texts to be inert by constantly questioning and inviting the reader to bring in experiential insight, a fundamentally different approach from other law school textbooks. Professors should enhance the course by supplementing the book with films such as *Who Killed Vincent Chin?*,¹¹ *The Road to Brown*,¹² and *Of Civil Wrongs: The Fred Korematsu Story*¹³ to break away from textbook stasis. The internet has also been used very successfully as an interactive learning device and as a forum for student and faculty projects in Race and Law Seminars.¹⁴

10. The students selected Chapter Twelve, "Racism and Popular Culture: Historical Images and Current Successes," and Chapter Thirteen, "Race and Crime."

11. *Who Killed Vincent Chin?* (PBS television broadcast, 1989).

12. *The Road to Brown* (PBS television broadcast, Feb. 13, 1991).

13. *Of Civil Wrongs: The Fred Korematsu Story* (PBS television broadcast, July 10, 2001).

14. See, for example, Professor Vernellia Randall's Race, Racism and the Law website used in conjunction with her seminar at the University of Dayton Law School, *available at* <http://www.udayton.edu/~race> (last modified Apr. 16, 2001). I have used my own website to post student papers. <http://www.scu.edu/law/FacWebPage/Armstrong/> (last visited Apr. 24, 2001).

Professors of Race and Law courses often require their students to write reflection pieces throughout the semester. Professor Charles Lawrence describes these brief writing assignments:

Each week students are required to write a brief essay recording their reactions to some portion of the readings for that week or to the impact of the readings as a whole. I ask that the students use these essays, which I call reflection pieces, as a vehicle for reporting gut reactions or feelings evoked by the readings. I tell them that I do not want legal analysis Reflection pieces serve several purposes. Students come to class prepared. But more than that, they come having already engaged in the process of experiencing the harmony or dissonance between their own perspectives and the perspectives described in the readings.¹⁵

I regularly assign reflection pieces in my seminars for a variety of purposes. These exercises enable students to process and articulate their reactions to the assigned materials, to relate ideas they glean from the seminar to experiences that occur outside the classroom, or to react to the class itself. Let me end by presenting a sample reflection piece, my own. It represents the joy and anticipation that I felt as a teacher being able to use the text to teach students in my seminar.

II

TEACHER'S REFLECTIONS, CLASS ONE

The variety of faces in the law school's seminar room represents a triumph. Only fifty years earlier the United States Supreme Court allowed a state to provide a legal education to its citizens of African descent by consigning them to a roped off space in the State capitol with three law teachers.¹⁶ More recently, the admission of African American and Latino law students to public law schools of California, Texas and Washington dwindled after court decisions, voter initiatives and administrative policy repudiated race-conscious admissions policies.¹⁷ But in January 1990 the students enrolled in a Race and Law seminar, offered at a private law school in Northern California, epitomize the state's

15. Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2247 (1992); see also *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037 (Derrick Bell et al. eds., 1990).

16. This is what the state of Oklahoma offered Ada Sipuel after the per curiam decision in *Sipuel v. Board of Regents*, 332 U.S. 631 (1948). See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 257-60 (1977). The Supreme Court later determined that such makeshift or fabricated law schools could not satisfy equal protection in *Sweatt v. Painter*, 339 U.S. 629 (1950).

17. See Daria Rohtmayer, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 297, 364-65 n.3 (1988).

future, arrived ahead of schedule.¹⁸ They represent a plentitude of origins and mixtures: White, Black, Mexican, Caribbean (Afro and Latin), Central American, Asian and Pacific Islanders, Jewish, Sikh, Muslim. A few have strands of American Indian ancestry, but are not affiliated with any tribe. The class represents the Diverse America of the book's subtitle, a living connection to the text we are about to study.

18. California is expected to become the second state in modern times (after Hawaii) in which Whites will be outnumbered by non-Whites. The California Department of Finance's Demographic Research Unit predicts that by July 2001 Whites will comprise less than 50% of the state's population. But according to U.S. Census Bureau estimates for 1999, Whites totaled 49.9% of California's 33.1 million residents. Latinos comprised 31.6% of the state population, followed by persons of Asian ancestry (11.4%), persons of African ancestry (6.7%), and American Indians (less than 1%). Soraya Sarhaddi Nelson & Richard O'Reilly, *Minorities Become Majority in State, Census Officials Say*, L.A. TIMES, Aug. 30, 2000, at A1. See also CAL. STATE DEPT. OF FIN., DEMOGRAPHIC RES. UNIT, RACE/ETHNIC POPULATION ESTIMATES, available at <http://www.dof.ca.gov/html/Demograp/race-eth.htm> (last modified Mar. 2001).

Book Review

Do You Believe in the Rule of Law?

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.

Edited By Juan F. Perea,[†] Richard Delgado,^{††} Angela P. Harris,^{†††} and
Stephanie M. Wildman.^{††††}

St. Paul: West Group, 2000. Pp. xlix, 1171. \$60.00 cloth.

Reviewed by Robert A. Williams, Jr.[‡]

Do you believe in the rule of law, I mean really believe? Do you believe judges ought to decide like cases alike and treat people of equal worth and human dignity equally? Do you believe that slavery and servitude, or colonization and conquest, can never be justified by any court guided by the rule of law? Do you believe that the rule of law is a means to a greater end for humanity and justice for all? If so, then you should teach your students about the legal history of racism in this country. It will test all of your beliefs about the rule of law in the White Man's America.

You will need teaching materials of course, and stories, lots of stories. You will need to construct legal narratives and assemble other interdisciplinary resources as well. It will take a lot of work to teach this type of "race" course. Take it from somebody who knows.

Those of us who already teach our favorite "race" courses (mine is federal Indian law) usually have put together all that stuff, often on our own and normally for just our own courses. There are few casebooks on the market offering a "race" perspective on American law. A "race" perspective, as I define that term, employs the concepts of race and racism as critical tools for examining and understanding how the dominant White society applies the rule of law to discrete and insular minority racial groups in America. One simply cannot find many law school casebooks adopting this race perspective on American law. The beneficent exception is Derrick Bell's monumental casebook *Race, Racism, and American Law*,¹ which has

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1. DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000).

had a signal imprint upon the scholarship and particularly upon the teaching and course designs of so many of the present generation of minority legal scholars in this country.

I

TEACHING FROM A RACE PERSPECTIVE ON AMERICAN LAW

Only a race perspective both permits and requires you to tell the story of the major racial minority groups in this country (African Americans, American Indians, Latinos/as, and Asian Americans) as a critical chapter in the legal history of racism in America. That is why I use a race perspective when I teach Indian law to my students. I have studied the legal history of how the rule of law has been applied to Indians in this country, and I could not teach it any other way.

Because I come from a storytelling culture, I use loads of stories and narratives in my "race" course on Indian law. I have a whole bunch of great stories that I have collected over the years about Indian rights and the rule of law in the White Man's America. I can tell each one in perfectly timed, fifty-minute blocks. I have a great *Far Side* cartoon of the Chief of the Manhattan Indians "addressing his tribe for the last time in 1626." I use it to show my students how the only Indian treaty they know about before they enter my class is a joke to most White people. I also have a slide show, complete with a map of the voyages of European discovery during the fifteenth and sixteenth centuries. That is when the legal history of racism in America really got going, I tell my students. Another slide I show is a portrait of Chief Justice John Marshall, in classic "dead White guy" pose. He is the hero of the White Man's Indian law, I tell them. Without him, some law professors say there probably would not be any Indians around anymore.

Of course, teaching from a race perspective can depress some students at first. You have to lighten things up at times, so I have my own canned jokes. You should hear me rip into Columbus when I talk about the doctrine of discovery and its acceptance into United States law by Chief Justice Marshall in *Johnson v. McIntosh* (pp. 175-78).² "Dude never knew where he was going, never knew where he was when he got there, and never figured out where he'd been after he left. Died thinking he'd be famous one day for discovering Japan."

A race perspective on Indian law allows me to teach my students to question their beliefs about the meaning of the rule of law in America. They learn about a well-elaborated and widely disseminated legal tradition developed in Europe during the Middle Ages, a legal tradition that justified the conquest of the "heathen" and "infidel peoples" because they were in

2. 21 U.S. (8 Wheat.) 543 (1823).

violation of Christian European natural law.³ My students learn to examine critically how that legal tradition informed the “doctrine of discovery,” which European nations used to justify their superior rights of sovereignty in the New World in the fifteenth and sixteenth centuries.⁴ My students come to understand how this doctrine led to European colonization and conquest of the “savages” of North America on the basis of their “inferior” character and religion. My students learn to analyze and deconstruct the subtle form of racist reasoning used by Chief Justice John Marshall in the case of *Johnson v. McIntosh*, despite his best efforts to escape detection, in declaring the doctrine of discovery as the rule of law for Indian rights in the United States. By developing their own critical perspectives on the role of race and racism in Indian law, they learn to question the way courts of law perpetuate and regulate racial power and privilege in the United States.

Teaching students how to develop race perspectives on the rule of law in America helps them see how patterns of racial domination become embedded in American legal history. By using the categories of race and racism as central analytical tools and legal history as a principal method, students recognize that the rule of law has been historically applied to Indian tribes to institutionalize and justify their inferior racial status in America. Students see that horrible things happen to Indian tribes under the White Man’s law: the Removal Act’s ethnic cleansing of the Cherokees, despite Chief Justice Marshall’s vain efforts to protect Indian rights in the *Cherokee Cases* (p. 191-207);⁵ the extra-constitutional imposition of an alien culture of criminalization and incarceration in Indian Country on the grounds of the Indians’ supposed weakness and helplessness, affirmed by the Supreme Court in *United States v. Kagama* (p. 213-15);⁶ the unilateral abrogation of Indian treaties by Congress, upheld as a non-justiciable political question by the Supreme Court in *Lone Wolf v. Hitchcock* (p. 216).⁷

A race perspective on Indian law helps students develop a keen awareness of the complex relationship between law, power, dispossession and violence in the legal history of racism in the United States, through the lens of one racial minority group’s experience under the rule of law in America. Students exposed to race perspectives in the law school curriculum gain other innumerable benefits and valuable insights. My students can better appreciate the complexities of achieving racial justice for any racial minority group in America.

3. DAVID GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 42-46 (4th ed. 1998).

4. *Id.* at 46-72.

5. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

6. 118 U.S. 375 (1886).

7. 187 U.S. 553 (1903) (relying on the *Chinese Exclusion Cases*).

For example, consider the problem presented by the Supreme Court's 1974 decision in *Morton v. Mancari* (p. 225-28).⁸ The Court held that a hiring preference for Indians in the Bureau of Indian Affairs was not subject to the strict scrutiny which is typical of racial classifications challenged under the Fourteenth Amendment. At least according to the Supreme Court's perspective on Indians and their peculiar legal status, "Indian" is not really a "racial" classification at all. Instead, it is a "political" classification. A race perspective helps students recognize this classification as nonsense, but also that this nonsense provides a critical defense for Indian preferences. As the *Morton* Court knew, no other racial minority group had been treated like Indians under United States law. A whole title of the United States Code had been constructed from the complex legal history of race, racism, and Indian rights in American law.⁹ Had the Court in *Morton* ruled the Indian hiring preference unconstitutional under the Fourteenth Amendment, they would have had to throw a whole volume of the United States Code out the window. In learning that Indians have a unique legal history in the White Man's America, a history unlike any other racial minority group's, students become more receptive to one of the most important insights that can be gleaned from a race perspective on American law; while there is no Bureau of African American, or Mexican American, or even Asian American Affairs in the United States, each of these minority groups has its own unique and undoubtedly interesting stories to tell about its historical relationship to the rule of law in America.

II

LEARNING TO BE A RACIAL REALIST

Perhaps the most important lesson students learn from a law course taught from a race perspective is that racial justice will not be easy to attain for any minority group in the White Man's America. Students recognize the harshness and rigidity of the racial attitudes that courts, including the Supreme Court in its major race decisions, have perpetuated. For example, students understand how threats and violence directed at Indians today, when they try to exercise Indian treaty rights to hunt and fish off their reservation (pp. 228-30),¹⁰ reflect the Court's long history of decisions denigrating Indian legal status and rights. Students recognize the shadow of that legal history in expressions like "Custer had the right idea" and "Go home to the reservation; you're a conquered nation" (p. 230). Having been exposed to a race perspective on Indian law, students are not so sanguine as

8. 417 U.S. 535 (1974).

9. See 25 U.S.C. (1994) (Indian Affairs)

10. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991).

to believe that after five hundred years, the rule of law in America will start on its own accord to recognize Indians as people of equal worth and human dignity in this country. They realize the hard road ahead for achieving racial justice for Indian peoples. Having taken a law school course taught from a race perspective, they know what it means to be a racial realist in America.¹¹

As racial realists, these students understand that the precarious situation of Indian rights in America requires them to be open to new and innovative social, political, and legal approaches to problems of race and racism in contemporary America. The increasing reliance by Indian peoples on the international human rights system for protection of their lands, resources, and culture (pp. 236-44), for example, teaches students that alternative legal visions of indigenous peoples' rights and human dignity exist. Through this broadened awareness, they come to understand that the legal legacies of slavery and servitude, colonization, and conquest will continue to undermine the very possibility of new approaches to the problems of race and racism, at least until courts adopt a much different vision of racial justice. Ultimately, adopting a race perspective on the past, present, and future of Indian rights in America requires law students to test virtually every prior belief they have ever had about what the rule of law really means in this great country of ours.

III

Race and Races: TEACHING FROM MULTIPLE RACE PERSPECTIVES ON AMERICAN LAW

If teaching a course from the perspective of a single racial group can give students these important benefits as part of their law school education, then imagine the benefits that students can derive from a course that employs multiple race perspectives on American law. Such multiple race perspectives on the legal history of racism in America would teach them how the rule of law has been applied to a much broader set of racial minority groups in this country, as well as the different strategies those groups have adopted to survive and create a diverse America. *Race and Races: Cases and Resources for a Diverse America* provides those multiple race perspectives, focusing on a broad range of vital topics and issues of race and racism in American law.¹²

11. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

12. I disclose here that I know a majority of the editors of *Race and Races* as good colleagues and friends, and I find myself mentioned in the first sentence of the book's acknowledgments page, along with generous and judiciously selected and edited excerpts from my own work on Indian rights. And so I cannot make up some silly story about how I objectified myself into a positionality where I adopted a detached, neutral narrative voice and then wrote a rave review about the fine job they have done with this casebook. Please. But this is an important and in many ways singularly significant

In its diverse and impressive range of viewpoints and perspectives, *Race and Races* sets out to achieve an ambitious goal: “to present race and racism in a manner that corresponds to the racial complexity of United States society” (p. 1). In adopting multiple race perspectives on American law, *Race and Races*, for the first time in American legal education, provides an integrated and imaginatively conceived set of published teaching materials for a comprehensive course on the rule of law as applied to African Americans, American Indians, Latinos/as and Asian Americans in the White Man’s America.

By incorporating a multiplicity of race perspectives into a single casebook, *Race and Races* is in many ways as significant an innovation as the first casebook adopting a race perspective in the United States: Professor Bell’s *Race, Racism, and American Law*. Aside from this significance, *Race and Races* also represents an important theoretical and practical moment in the study of race and racism in American law. Its choices on what a casebook adopting multiple race perspectives on American law ought to include hold the potential for reshaping the way that the next generation of law students and lawyers responds to issues of race and racism throughout the entire law school curriculum.

The co-editors tackle the most thorny and persistent problem that any “race” course must address: the problem of defining what is meant by the terms “racism” and “race.” This problem is more pronounced and persistent in a course attempting to capture the diversity of legal experiences of all the major “racial” groups in America. *Race and Races* confronts the problem of defining analytical tools in its introductory chapter, and revisits, refines, and develops new and fresh perspectives on the definition of race and racism in American law throughout the rest of the book. Thus, in both its structure and its content, *Race and Races* teaches students about the priority as well as the persistence of this central definitional problem in any discussion of race and racism in American law.

The co-editors provide initial guidance through this definitional thicket in their first chapter by exploring Omi and Winant’s theory of “racial dictatorship” as a way to describe the distribution of racial power in the United States from 1607 to 1865 (pp. 12-13). Interpreting United States history as a racial dictatorship of one race over all other races is a useful and provocative way to organize and analyze the commonalities as well as the particularities in the legal histories of the four minority groups studied in the casebook. As this first chapter demonstrates, the concept of a racial dictatorship also furthers an understanding of the hegemonic function of the “color line” elaborated, articulated, and enforced in United States society by the master racial group. Although Omi and Winant’s influential

casebook in American legal education: one well worth celebrating, with colleagues, friends, and the legal world more generally.

formulation of the concept of racial dictatorship helps students begin to work their way through the problem of defining key terms, *Race and Races* presents many ways in which we can define the meanings of race and racism in American law and United States society. Maintaining this multiplicity of perspectives as a persistent theme throughout the casebook is what makes *Race and Races* one of the most engaging, sustained interdisciplinary discussions on the concepts of race and racism ever to appear in an American law textbook. It teaches, in powerful, empirical fashion, that there is no one correct way to understand race and racism in America. Rather, it recognizes the complex intersections of different modes of analysis, critique, and discourse that can be employed by adopting multiple race perspectives on American law.

IV CONCLUSION

Race and Races provides what I imagine most teachers of “race” courses, and others who have never taught a course from a race perspective, have always wished they had: an interdisciplinary set of teaching materials on the legal histories of the major minority groups in America. The four chapters, laying out the legal histories of African Americans (pp. 91-172), American Indians (pp. 173-245), Latinos/as (pp. 246-366), and Asian Americans (pp. 367-428), each contain the major cases that have defined the groups’ status and rights under American law, plus other, less well-known cases that amplify the problems and issues of race and racism in American law. Each of these chapters also includes a lively and engaging set of interdisciplinary materials and resources to provide a concise theoretical overview of each group’s legal experiences. There is even a provocative and illuminating chapter on Whiteness, and richly-conceived and well-integrated teaching materials arranged by chapter on central legal issues and problems that cut across the color lines of American society. Multiple race perspectives are presented on such diverse topics as equal protection, voting rights, education, civil liberties, sexuality and the family, racism in popular culture, and race and crime.

Given the gaps in most law students’ legal education when it comes to examining the role of race and racism in American law, the information and knowledge contained in *Race and Races* will provide an invaluable and previously unavailable collection of stories and legal narratives to help students better understand the critical differences and commonalities in how the rule of law has been applied to the different minority groups in the United States. For many of these students, these stories will inform the way that they evaluate how perspectives on race are incorporated in, or more likely, excluded from, the rest of the law school curriculum. Knowing about the important stories told in *Race and Races* can help students sig-

nificantly change the way that the rule of law is thought about in American legal education, simply by means of a raised hand in a class that has failed to recognize the significance of race and racism in American law.

Book Review

Teaching Race Through Law: “Resources for a Diverse America”

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.

Edited By Juan F. Perea,[†] Richard Delgado,^{††} Angela P. Harris,^{†††} and
Stephanie M. Wildman.^{††††}

St. Paul: West Group, 2000. Pp. xlix, 1171. \$60.00 cloth.

Reviewed by Eric K. Yamamoto[‡]

INTRODUCTION

“I couldn’t talk about it for over forty years. Not to my children. Not to friends. Not a word.”¹ The sixty-year old woman, born and raised an American citizen, was speaking of the Japanese American internment: the U.S. government’s World War II incarceration of 120,000 Americans of Japanese ancestry in desolate concentration camps without charges, trial or, as ultimately shown, evidence of group-based disloyalty or military necessity.² The woman lost her home, family business, relatives and, most important of all, her dignity and freedom. Racial vilification followed her

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1. Conversation following forum on the Coram Nobis Cases and the Internment, Stanford Law School (May 1984).

2. For in-depth discussions of the Japanese American internment, the legal challenges to it, and the redress movement, see REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (Washington D.C., U.S. Government Printing Office, 1982); Sandra Taylor, *The Internment of Americans of Japanese Ancestry*, in WHEN SORRY ISN’T ENOUGH 165 (Roy Brooks ed., 1999); Eric K. Yamamoto, *Korematsu Revisited: Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review—Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986); Leslie T. Hatamiya, *Institutions and Interest Groups: Understanding the Passage of the Japanese American Redress Bill*, in WHEN SORRY ISN’T ENOUGH, *supra* at 190.

release from years of imprisonment. Yet the Supreme Court upheld the constitutionality of the "exclusion" (as it was euphemistically called).³

This Nisei (second-generation Japanese American) woman spoke to me after a large public forum on the successful reopening of the infamous World War II internment cases. Mid-1980s *coram nobis*⁴ proceedings in *Korematsu*⁵ and *Hirabayashi*⁶ drew upon newly discovered government wartime documents and revealed three extraordinary facts. First, before the internment, government intelligence services unequivocally informed officials at the highest levels of the military and the War and Justice Departments that Japanese Americans living on the West Coast posed no serious danger to the war effort and that there existed no need for mass exclusion or internment.⁷ Second, the West Coast military commander based his internment decisions on invidious racial stereotypes about the inscrutability and inherent disloyalty of Japanese Americans.⁸ Third, the War and Justice Departments concealed and destroyed key evidence and deliberately misled the Supreme Court about the purported "military necessity" basis for the internment when the Court was deciding the original *Korematsu* and *Hirabayashi* cases.⁹

After the forum on the *coram nobis* cases, the Nisei woman waited and spoke quietly. "I knew we didn't do anything wrong, but the President, Congress, and the courts said the internment was right. I came to seriously doubt myself." But then, years later, "our children and many [non-Japanese American] friends fought to clear our name. They opened our eyes to why this all happened to us, and also to why others in America have been so badly treated, like the Blacks. Maybe we'll get reparations." She concluded, "Now I can talk about it. This has freed my soul."¹⁰

Race and Races: Cases and Resources for a Diverse America, by Juan Perea, Richard Delgado, Angela Harris, and Stephanie Wildman, is

3. *Korematsu v. United States*, 323 U.S. 214 (1944) (declaring constitutional under the Fifth Amendment Due Process clause the federal government's World War II exclusion of persons of Japanese ancestry (primarily United States citizens) from West Coast areas, leading to their indefinite incarceration without charges or trial); *see also* *Hirabayashi v. United States*, 320 U.S. 81 (1943) (declaring constitutional the federal government's World War II curfew imposed only upon persons of Japanese ancestry, including United States citizens).

4. A writ of *coram nobis* is an extraordinary court-issued writ that operates to rectify "manifest injustice" in the judicial process by correcting fundamental errors in criminal proceedings. The writ is rarely issued. It is used to "clear the name" of a wrongfully convicted defendant after conviction, appeal and imprisonment. (By contrast, the related habeas corpus writ is used to free a criminal defendant wrongfully held in custody.) *See* *United States v. Morgan*, 346 U.S. 502 (1954).

5. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). I served as a member of the legal team representing Fred Korematsu in his *coram nobis* case.

6. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

7. *Korematsu*, 584 F. Supp. at 1416; *Hirabayashi*, 828 F.2d at 600.

8. *Korematsu*, 584 F. Supp. at 1416-17.

9. *Id.*; *see also* Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENVER J. INT'L L. & POL'Y 223, 226 (1992).

10. *See supra* note 1.

the first multiracial, multidisciplinary casebook for courses on Race and American Law. It succeeds spectacularly as both pedagogy and scholarship. As a law teacher I feel, at last, that I have a casebook for class that really helps us “talk about it.” And while it may not free our souls, the casebook will inspire students and significantly elevate the teaching of Race and American Law and related courses to new levels of breadth and sophistication.

Before *Race and Races*, I and many other teachers compiled our own course readers, a hodgepodge of constantly changing materials drawn from a variety of sources, without introductions, transitions, or notes and questions. These ad hoc readers worked well enough because of the thought behind them, the wealth of materials available, and the support of Derrick Bell’s magnificent treatise, *Race, Racism and American Law*.¹¹ What was missing, however, was a multiracial and multidisciplinary text that looked like a casebook, with its cases, statutes, and notes, but that also brought a critical edge to traditional constitutional law and civil rights casebooks’ handling of racial justice issues. What we needed was a casebook that would enable us to systematically explore race and law in all its often oppressive but occasionally liberating dimensions. Overall, *Race and Races* does this in exemplary fashion. *Race and Races* will serve as a standard bearer for critical-theory-informed casebooks generally¹² and for more specialized race and law casebooks to follow.¹³ *Race and Races* gives us what we need to “talk about it.”

To complement these broad observations, I will first highlight some of the specific salutary dimensions of the casebook. I will then follow with a critique of two areas in which the book can be strengthened for its next incarnation.

I

STRENGTHS OF *Race and Races*

The list of highlights is long. To start, the editors are highly respected scholars. While their writings range across the spectrum of subjects, their critical race theory scholarship places them at the cutting edge of debates on racial justice.¹⁴ This is significant because their theoretical choices

11. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000). Some use this comprehensive and in-depth treatise as a course book.

12. For another standard bearer, in the area of contracts and commercial law, see AMY HILSMAN KASTELY ET AL., *CONTRACTING LAW* (2d ed. 2000).

13. See, e.g., GABRIEL J. CHIN & SUMI CHO, *ASIAN AMERICANS AND LAW* (forthcoming 2001); ERIC YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

14. See, e.g., *IMMIGRANTS OUT* (Juan F. Perea ed., 1997); RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); *PRIVILEGE REVEALED* (Stephanie Wildman ed., 1996).

about how questions of race and racism should be presented to students also illuminate the larger intellectual enterprise of rethinking race, rights, and justice in the new century.

Race and Races' Introduction and opening chapter set the theoretical stage. They are not to be missed in a rush to the cases. The Introduction provides a list and brief explanation of tools of critical inquiry (p. 3), which gives students an immediate handle on the book's approach. I ask students to refer back to these rough queries as they read throughout the course: "Make the Implicit Explicit," "Look for the Hidden Norm," "Avoid We/They Thinking," "Remember Context," "Seek Justice," "Consider the Harm," "Trust Your Intuition," and "Ask, Who Benefits?" They serve as a kind of primer for critical inquiry. Significantly, these queries are framed less as commands and more as questions. The book's critically informed approach is imparted with a light hand.

The first chapter does a masterful job of handling the difficult problem of defining race and racism. Its approach is to use tightly edited articles, drawn from both legal and social science scholarship, followed by insightful notes and questions. The carefully framed excerpts from Omi and Winant on racial dictatorship (pp. 12-13), Young on theories of oppression (pp. 14-15), Blauner on internal colonialism (pp. 16-20), Williams on Memmi's discursive strategies of racism (pp. 26-28) (my students find Memmi particularly incisive), Krieger on the cognitive psychology of discrimination (pp. 33-36), Lawrence on cultural meaning and the equal protection intent requirement (pp. 37-41), Foster on environmental justice (pp. 46-48), Feagin and Feagin on "scientific" conceptions of race (pp. 56-58), Gotanda on critical conceptions of race (pp. 61-63), and Hernandez (pp. 69-77) on census racial categories, produce an extraordinary quilt of basic legal and sociological concepts. Working through each of these essays and linking them to one another creates an intellectual framework for the course, and is, in my experience with the book, an exceedingly valuable investment of teaching time and effort.

After this theoretical introduction, the book moves through group legal histories and then to substantive themes. This organizational structure works well. I find teaching group identity history first provides a necessary foundation for students in a course on race, since many of them lack historical grounding. The sequential coverage of African Americans, American Indians (to which I add Native Hawaiians), Latinos/as, Asian Americans and Whites enables me to teach legal history as a complex story about race in America, a story that, with variations, repeats over and over. It also enables me to introduce themes that we will explore later in greater depth, such as Reva Siegel's "preservation-through-transformation" thesis about equal protection jurisprudence and its tendency to transform itself in response to pressures for change while preserving status inequalities in new

forms.¹⁵ The African American chapter (pp. 91-172), for instance, does this superbly. With a critical eye, and using multidisciplinary materials (the Lavinia Bell interview (pp. 112-14) alone transforms students' grasp of slavery), the chapter takes us from the Constitution's framers through slavery, Reconstruction, Jim Crow, the NAACP, the Civil Rights Movement and contemporary racism.

The book then moves to themes, or issues. By the second half of the course students are hungry for in-depth conceptual study, and the thematic chapters deliver. The themes range widely, developing notions of equality, voting, segregation in housing and education, freedom of expression, sexuality and the family, popular culture, crime, and responses to racism. This range allows teacher to pick and choose from a cornucopia of topics. No one can teach it all. All of these thematic chapters are thoughtfully prepared and deep, some of them are striking and innovative. For instance, the carefully integrated chapter on "Race, Sexuality, and the Family" (pp. 866-958) and the compelling chapter on "Racism and Popular Culture" (pp. 959-1016) can be found in no other teaching materials, and certainly not in any casebook.

What *Race and Races* does far better than any traditional casebook is introduce, without imposing, tools of critical inquiry and provide the multidisciplinary "resources" (as the book's subtitle says) for contextualized and particularized analyses. It is an approach invaluable not only for teachers and students, but also for scholars interested in a broad grounding in race and law.

II CRITIQUE

Race and Races, though excellent overall, has some shortcomings in specific areas that should be addressed in subsequent editions. I will discuss improvements I would like to see in the two areas with which I am most familiar: Asian Americans and Reparations for Historical Injustice.

A. Asian Americans

"Asian Americans" (pp. 367-428) is the casebook's one weak chapter. It is the book's shortest chapter, half the length of the strong "Latinos/as" chapter (pp. 246-366). Page length itself is not especially important. What is important, however, is the Asian American chapter's overly narrow focus and omission of key study areas. The picture presented by the chapter is skewed.

15. Reva Siegel, *Why the Equal Protection Clause No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); see also Reva Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

The chapter focuses on only two Asian American ethnic groups: the Chinese and Japanese. This leaves out of the Asian American picture the dramatic impact of the 1965 Immigration Act reform¹⁶ on the immigration of Filipinos, Vietnamese, Koreans, Indians, Laotians, Cambodians, and Hmong. These “other” ethnic Asian Americans collectively far outnumber Chinese and Japanese Americans¹⁷ and have dramatically changed how we grapple with Asian Americans in U.S. law and culture. For example, it was the immigration of these Asian groups along with Latinos/as that became the target of California’s anti-immigrant Proposition 187¹⁸ in 1994, which, in turn, spurred anti-immigrant legislation across the country.¹⁹ The omission of these Asian ethnic groups from the chapter, save for brief references in two of the articles, will feel inadvertently exclusionary to many Asian American students and teachers. More importantly, the chapter creates a distorted vision of Asian America and its connections to contemporary American law.

One half of the chapter is devoted to the law’s treatment of Chinese Americans in the nineteenth century. While this was an early formative period in Asian American legal history, it does not warrant five of the nine subsections of the chapter, especially because the notes and questions following each section are sketchy and do not provide enough substance to connect meaningfully with other Asian American and law issues, historical or current. Unlike the other chapters’ notes and questions, these have the feel of limited preparation.

The chapter does a somewhat better job of handling Japanese Americans. It nevertheless falls far short in key areas. The very brief discussion of anti-Japanese initiatives before World War II (pp. 397-406), crucial to a contextual understanding of the internment, is barely adequate. The selected materials on the Alien Land Law (pp. 398-404), which prohibited Japanese ownership of land as a way of blocking their ability to compete as farmers, are quite good. But the brief questions after the statute and the

16. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §1-14354) (eliminating discriminatory national origin quota system in place since 1924 for U.S. immigration law).

17. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS 323 tbl. 253 (1992); see also Gregg Van DeMark, *Too Much of a Good Thing*, *Plyer v. Doe*, and *American Hubris*, 35 WASHBURN L.J. 469 (1996).

18. Proposition 187, approved Nov. 8, 1994 (Initiative Statute: Illegal Aliens: Public Services, Verification, and Reporting) (codified at CAL. PENAL CODE §§ 113, 114, 834(b) (West 1999)) (establishing a state screening system to prevent undocumented immigrants from obtaining state benefits, including public education for children).

19. See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as at 42 U.S.C. § 1305) (cutting off welfare benefits to legal immigrants); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.) (authorizing indefinite detentions of aliens with criminal records).

case give short shrift to the significance of these laws and do not foster student discussion about the legal setting for the internment.

A more important issue is what I consider to be the chapter's faulty handling of the Japanese American internment cases. The internment was a defining moment for Japanese Americans and for many other earlier Asian American immigrants. It signaled the law's ostensibly neutral but—in reality—political treatment of Asian Americans and, by extension, all “outsiders” in America, at least in times of national stress. The *Korematsu* case, and its challenge to the legality of the internment, are still taught in many constitutional law courses and in almost all race and law courses. It is a case significant to scholar's understanding of constitutional law. And my story of the Nisei woman at the opening of this review offered a glimpse of the human depths of the underside to this racial story, and the importance of giving it voice.

Yet the chapter's Japanese American section (pp. 397-412) barely touches upon the internment issue, only five pages in all. An excerpt by Takaki (pp. 407-11) does provide a picture of the assembly processing centers and internment camps. But the internment cases receive next to no attention, one and a half pages. There is no analysis of the government's assertion that “military necessity,” that is, Japanese Americans' perceived cultural propensity toward disloyalty and acts of espionage and sabotage, justified the internment. There is no discussion of the “extraordinary facts,” recited at the beginning of the Review,²⁰ which showed that key government officials knew that no military necessity basis for the internment existed, that the internment decisions were based on racial stereotypes, and that the government deliberately destroyed, suppressed, and altered all evidence of these facts in its presentation to the Supreme Court. After a short set-up, the chapter briefly quotes the *Hirabayashi* Supreme Court opinion. Neither equal protection analysis nor political commentary follows. No notes and questions examine the Court's rationale. No reference is made to the *Hirabayashi* coram nobis Ninth Circuit opinion in 1987 vacating *Hirabayashi*'s conviction because of “manifest injustice” in the government's prosecution of the original case.²¹

Most disconcerting, the section dismisses the *Korematsu* case in three perfunctory lines and a citation, without any hint of its legal or social significance then or now, without any mention of the egregious governmental misconduct in prosecuting the case in concealing and fabricating evidence on “military necessity,” without any linkage of the revelation of that government misconduct in the *Korematsu* case to the subsequent congressional authorization of reparations for former internees (reparations are mentioned

20. See *supra* notes 7-9 and accompanying text.

21. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

in a note at the section's end).²² Although the *Korematsu* case is reproduced in a later chapter on equality, the casebook's dismissive treatment in the Japanese American section of the Asian American chapter, along with the overall superficial treatment of the internment and the silence about the *coram nobis* litigation, leaves a huge gap in this chapter of the casebook.

The chapter's section on contemporary issues, with selected excerpts from Chang on the "model minority" (pp. 412-18), Saito on Asian American "foreignness" (pp. 419-422), and Kang on hate violence (pp. 423-28), is much stronger. The articles raise current and often vexing issues for Asian Americans. The notes and questions for this section, however, are sparse and, generally, superficial. Many teachers not versed in Asian American legal issues may be tempted to skip the material.

The chapter could be significantly strengthened by addressing the aforementioned critiques. This could be done without adding many pages, particularly if the Chinese American section is shortened. The chapter could also be enhanced by the incorporation of cases raising contemporary Asian American legal issues, such as hate and economic violence, current immigration dynamics, labor rights, interminority conflict, and civil rights. My suggested additions would include *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*²³ (White fisherman enlisting the KKK to terrorize legal immigrant Vietnamese fisherman in Texas), *Ho v. San Francisco Unified School District*²⁴ (Chinese Americans successfully challenging a thirteen-year old public school desegregation consent decree achieved by the NAACP as an equal protection violation), Proposition 187²⁵ (Asian American and Latino/a groups succeeding in having the anti-immigrant initiative invalidated), *Fragante v. City and County of Honolulu*²⁶ (Filipino immigrant with top job qualifications denied city position because of accent), *Vincent Chin* sentencing²⁷ (probation sentence for angry unemployed White auto workers who, mistaking Chin for a Japanese person, beat his brains out of his head with a baseball bat), and *Thai Garment Workers*²⁸ (immigrant Thai women enslaved for years in an El Monte,

22. See Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-4(a)(1) (1988) (authorizing \$20,000 reparations payments to every surviving internee). See generally WILLIAM MINORU HOHRI, *REPAIRING AMERICA: AN ACCOUNT OF THE MOVEMENT FOR JAPANESE-AMERICAN REDRESS* (1988) (describing the linkage of "governmental misconduct" lawsuits to the overall redress movement); H.R. REP. NO. 278, at 9 (1987) (in debating the Civil Liberties Act, recognizing that the original Supreme Court decisions upholding the internment had been repudiated by scholars, former government officials and, most recently, by the federal courts); *Jacobs v. Barr* 959 F.2d 313 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 831 (1992) (citing impact of *coram nobis* cases on reparations).

23. 543 F. Supp. 198 (S.D. Tex. 1982).

24. 965 F. Supp. 1316 (N.D. Cal. 1997).

25. See *supra* note 18.

26. 888 F.2d 591 (9th Cir. 1989).

27. *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986).

28. *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996); see also Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998).

California garment factory, suing clothing retailers who commissioned the garments).

B. Reparations

The second area for enhancement is reparations. Reparations have come to the fore as part of American, and indeed worldwide, racial justice law. In the United States in 1999, the federal government settled a multimillion dollar reparations claim by African American farmers that were deliberately excluded from the Department of Agriculture's loan programs.²⁹ Tulsa is in the process of conferring reparations for the mayhem inflicted by White residents on African Americans in the 1920s,³⁰ much like the reparations for the African American survivors of Rosewood in Florida.³¹ Aetna Insurance Company apologized and paid reparations for its past discriminatory insurance practices.³² African Americans have announced the filing of class action reparations claims against businesses that profited from slavery and Jim Crow segregation,³³ and Congressperson John Conyers has proposed an African American Reparations Study Commission bill.³⁴ Native American tribes and Native Hawaiians have reparations claims pending for treaty and sovereignty violations, as well as for breaches of land trusts.³⁵ Japanese Latin Americans are demanding reparations for their kidnapping and internment by the United States during the Second World War.³⁶

Internationally, former Korean sex slaves are seeking reparations from the Japanese government,³⁷ and former worker slaves, abducted by the Japanese government during World War II, are claiming compensation from the private industries that benefited from their slave labor.³⁸ Similarly, worker slaves for Germany are receiving litigation-induced reparations

29. Salim Muwakkil, *USDA Settlement Advances Argument for Reparations*, CHI. TRIB., Jan. 18, 1999, at N15.

30. Brent Staples, *Unearthing a Riot*, N.Y. TIMES, Dec. 19, 1999, at 64.

31. Lori S. Robinson, *Growing Movement Seeks Reparations for U.S. Blacks*, ARIZ. REPUBLIC, June 22, 1997, at H1. (awarding \$150,000 to each of the nine survivors of the 1923 massacre where a White mob killed six Blacks and burned down the Black community of Rosewood, in addition to awarding between \$375 and \$22,535 to 143 descendants for lost property).

32. Michelle R. Davis, *Charleston, Like U.S., Hates to Think About Its History of Slavery*, THE SAN DIEGO UNION-TRIB., May 11, 2000, ZS-1.

33. Jack Hitt, *Making the Case for Racial Reparations*, HARPER'S MAG., Nov. 1, 2000, at 3751.

34. *Politicians, Scholars Voice Support for Slavery Reparations*, JET, May 15, 2000, at 48.

35. Nell Jessup Newton, *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in WHEN SORRY ISN'T ENOUGH 261 (Roy Brooks ed., 1999); ELAZAR BARKAN, *THE GUILT OF NATIONS* 216 (2001) (analyzes reparations claims by Native Hawaiians).

36. Natsu Saito, *Model Minority, Yellow Peril: Function of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997).

37. GEORGE L. HICKS, *THE COMFORT WOMEN* 189 (1995).

38. *Lawsuits to Seek Billions in Compensation from Japanese Corporations that Used Slave Laborers During WWII*, PR NEWSWIRE, Feb. 22, 2000.

from private businesses.³⁹ The South Africa Truth and Reconciliation Commission, its formal work completed, still oversees the halting reparations program it recommended to help heal the wounds of apartheid.⁴⁰

Roy Brooks says we are amid an "Age of Apology."⁴¹ I would modify that phrase and, borrowing from Elizabeth Spellman, say we are in the "Age of Reparation."⁴² Repair, rather than compensation, is the root word of reparation. Indeed, we have entered an era in which communities, governments, and nations are attempting, through the varying forms of reparations, monetary and nonmonetary, to repair the enduring personal and societal damage of injustice.⁴³

The concept of reparation thus deserves an extended treatment in *Race and Races*. Reparations, in the form of monetary awards, are mentioned in various places in the book (for example, in a brief note following the discussion of the Japanese American internment (pp. 411-12)). In addition, the excellent chapter on "Responses to Racism" (pp. 1091-1154) includes one article that discusses reparations in a more general sense (pp. 1123-28). That chapter, however, covers a lot of other important ground, including coalition-building, resisting White supremacy, and racial healing, and would become unwieldy if it was expanded to incorporate a fully realized reparations section.

What would enhance the casebook most is a separate chapter that engages rapidly developing reparations theory in the context of past and pending worldwide and national reparations movements.⁴⁴ Such a section would distinguish between legal (that is, court-asserted) claims for reparation and those focused on legislative, or even private, action. It would also explore the social psychological impact of the various forms of reparations and examine the dynamics of the reparations process, both its salutary potential and its underside.⁴⁵ It would enable its readers to assess bona fide

39. William Drozdiak, *Germany Signs Pact to Compensate Nazi Slaves*, INT'L HERALD TRIB., July 18, 2000, at 1.

40. Michelle Sieff, *Rights-South Africa: Apartheid's Victims Demand Reparations*, INTER PRESS SERV. Feb. 21, 1999, available at 1999 Westlaw, WL 5947136.

41. Roy L. Brooks, *The Age of Apology*, in WHEN SORRY ISN'T ENOUGH, *supra* note 35, at 3 (analyzing significant reparatory efforts in the United States and worldwide); See also MARTHA MINOW, BEYOND VENGEANCE AND FORGIVENESS (1998) (providing concepts, ranging from vengeance to forgiveness, for assessing government and social group responses to historic injustice).

42. See ELIZABETH SPELLMAN, FRUITS OF SORROW: FRAMING OUR ATTENTION TO SUFFERING (1998) (revealing the multiple dimensions of the concept of "repair").

43. See generally ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999); JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); BARKAN, *supra* note 35; RANDALL ROBINSON, THE DEBT (2000).

44. See Yamamoto et al., RACE, RIGHTS AND REPARATION, *supra* note 13; Brooks, *supra* note 41; MINOW, *supra* note 41; SPELLMAN, *supra* note 42; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 43.

45. See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998); Chris Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385 (1998).

reparation efforts and identify those that aim simply for “cheap grace.”⁴⁶ The interest in such a chapter, I suspect, would be considerable. Recall the sixty-year-old Japanese American woman who said that only now, after the revisiting of the internment cases, did she also see how badly African Americans had been treated in the United States. Only now could she hope for reparation.

In sum, *Race and Races: Cases and Resources for a Diverse America*, is a remarkable pedagogical and scholarly achievement. It defines a burgeoning field. It inspires. It works, for teachers and students. We now have a Race and Law casebook that enables us to “talk about it.”

46. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 43, at 175.

Book Review

Thinking About *Race and Races*: Reflections and Responses

RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA.
Edited By Juan F. Perea,[†] Richard Delgado,^{††} Angela P. Harris,^{†††} and
Stephanie M. Wildman.^{††††}
St. Paul: West Group, 2000. Pp. xlix, 1171. \$60.00 cloth.

Certain absences are so stressed, so ornate, so planned, they call attention to themselves; arrest us with intentionality and purpose, like neighborhoods that are defined by the population held away from them The spectacularly interesting question is “What intellectual feats had to be performed by the author or his critic to erase me from a society seething with my presence, and what effect has that performance had on the work?” What are the strategies of escape from knowledge? Of willful oblivion?

Toni Morrison¹

I

REFLECTIONS ON RACE AND RACES

The presence of people of color haunts the United States. Race and racism are central to the history, the mythology, and the basic institutions of American life, including American legal institutions. Yet American public discourse has seldom been forthright about the existence and implications of American racism. Thus, for example, prior to the Thirteenth Amendment in 1865, the Constitution never mentioned the word “slavery.” The drafters of the Constitution were scrupulously careful not to include the word anywhere in the document, even as they crafted compromises that protected and recognized the peculiar institution.²

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1. Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, in *WITHIN THE CIRCLE: AN ANTHOLOGY OF AFRICAN AMERICAN LITERARY CRITICISM FROM THE HARLEM RENAISSANCE TO THE PRESENT* 378 (Angelyn Mitchell ed., 1994); see also *TONI MORRISON, PLAYING IN THE DARK* (1992).

2. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 46-48 (4th ed. 2000) (listing the clauses that protected the institution of slavery).

The framers maintained this constitutional silence, it seems, to preserve the ideological integrity of the document.³ More recent silences about race in legal discourse seem intended to protect the public from being confronted with the enormity of racial injustice. For example, in decisions like *Shaw v. Reno*,⁴ *Adarand Constructors, Inc. v. Peña*,⁵ and *Rice v. Cayetano*,⁶ the Supreme Court has found governmental racial classifications unconstitutional under the Fourteenth and Fifteenth Amendments even when their purpose has been to ameliorate racial inequality and strengthen the political power of racialized and historically subordinated communities. In *McCleskey v. Kemp*,⁷ the Court refused to recognize a claim of systemic racial discrimination in the administration of the death penalty for fear of undermining the criminal justice system itself, a fear dissenting justice William Brennan described as “a fear of too much justice.”⁸ In these and other decisions, the Court has treated government recognition of race as inherently divisive and antidemocratic. Yet these decisions, imposing public silence on the issue of race, have had the practical effect of maintaining historical and continuing racialized inequalities of political and economic power.

The repercussions of this silence about the racialized injustice that so pervades American society are perhaps most haunting in areas that public discourse treats as race-free. In its recent decision in *United States v. Morrison*,⁹ for example, the Court held that Congress lacked authority under either the Commerce Clause or Section 5 of the Fourteenth Amendment to create a federal civil remedy for victims of gender-motivated violence, thus invalidating a portion of the Violence Against

3. In debating the wording of Article I, Section 9, which prohibited Congress from using its new commerce powers to restrict the importation of slaves, Speaker of the House Dayton was unambiguous about the reason for omitting the word “slave” from the constitutional text:

[I]n the discussion of its merits, no question arose, or was agitated respecting the admission of foreigners, but, on the contrary, that it was confined simply to slaves, and was first voted upon and carried with that word expressed in it, which was afterwards upon reconsideration changed for “such persons,” as it now stands . . . The sole reason assigned for changing it was that it would be better not to stain the Constitutional code with such a term, since it could be avoided by the introduction of other equally intelligible words, as had been done in the former part of the same instrument, where the same sense was conveyed by the circuitous expression of “three fifths of all other persons.”

Debate in the House of Representatives (June 16-20, 1798), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 377 (Max Farrand ed., 1966).

4. 509 U.S. 630 (1993) (redistricting legislation that is “unexplainable on grounds other than race” demands strict scrutiny).

5. 515 U.S. 200 (1995) (strict scrutiny is appropriate for all government racial classifications, whether created by federal or state governments).

6. 528 U.S. 495 (2000).

7. 481 U.S. 279 (1987).

8. 481 U.S. at 339 (Brennan, J., dissenting).

9. 529 U.S. 598 (2000). See also Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (declaring state governments immune from suit under the Americans With Disabilities Act).

Women Act (VAWA).¹⁰ Reviewing the scope of congressional power under Section 5, the Court held that because the Fourteenth Amendment applies only to state action, Congress had no power to create a civil remedy against private persons who engage in gender-motivated violence. This understanding of the Fourteenth Amendment is not compelled by the constitutional text itself, however, but is based on two cases decided shortly after the adoption of the amendment, *United States v. Harris*¹¹ and the *Civil Rights Cases*.¹² According to the *Morrison* Court:

The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.¹³

What the Court does not say is that when these cases were decided, the Supreme Court was engaged in a war with Congress over race and racism: a war in which the Court moved time and time again to thwart the project of making African Americans equal citizens. Akhil Amar points out, for example, that the intent behind section 1 of the Fourteenth Amendment reflected, in part, congressional desire to overrule the Court's infamous decision in *Dred Scott*¹⁴ that Blacks in America had no rights that White persons were bound to respect.¹⁵ Amar asks why the Rehnquist Court should choose to look for meaning in the interpretations of a hostile Supreme Court and not in the statements of the drafters of the Fourteenth Amendment.¹⁶

The Court's silence about our racial past has not only skewed its approach to statutory interpretation. Robert Post and Reva Siegel argue that

10. In deciding the Commerce Clause issue, the Court relied on its analysis in *United States v. Lopez*, 514 U.S. 549 (1995). The Court held that, while the line between the economic and noneconomic is not always crystal clear, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613.

11. 106 U.S. 629 (1882).

12. 109 U.S. 3 (1883).

13. *Morrison*, 529 U.S. at 622.

14. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

15. Akhil Reed Amar, *The Supreme Court 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

16. As Amar argues:

Many of the Congressmen supporting these laws had been leading architects of the Fourteenth Amendment itself. Why doesn't Chief Justice Rehnquist accord these men any epistemic respect? Founders such as James Madison and Thomas Jefferson, who lived and died as slaveholders, are treated with reverence by the Court (even though Jefferson was not even in America at the Founding). Why are Reconstructionists like John Bingham and Charles Sumner, crusaders for racial justice, treated with so much less respect?

Id. at 105-06.

the substantive scope of congressional power under Section 5, and the meaning of Section 1's guarantees, can be understood only by understanding our nation's long political and legal struggle over racial injustice.¹⁷ In passing over this history in silence, they argue, the Court's recent decisions concerning congressional power to pass antidiscrimination legislation threaten to construct a jurisprudence that is not only "mechanical" but may diminish the authority both of the Court and of the Constitution itself.¹⁸

The silences, omissions, and strained reasoning in these cases are not, in our view, the result simply of faulty reasoning or a misunderstanding of precedent. Rather, the cracks in *Morrison*'s analysis, and in the Court's jurisprudence of congressional power under the Fourteenth Amendment more generally, betray the effort required to ignore a central truth of American jurisprudence: that the constitutional principles of federalism and separation of powers on which *Morrison* and like cases turn are inextricably intertwined with the history of race and racism.

As the majority in *Morrison* acknowledged, "the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States is deeply ingrained in our constitutional history."¹⁹ But this principle, in turn, is seething with the presence of slavery, conquest, racial terror, and apartheid. These are the unquiet ghosts in the machine of federalism jurisprudence. *Race and Races*

17. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000). Post and Siegel write:

The Congress that passed the Fourteenth Amendment knew that it could not establish equality for the newly freed slaves without reaching deep into Southern society and reforming its fundamental principles. That is why it drafted Section 5. But the Supreme Court, fearing a disruption of the balance of the federal system, refused to allow this exercise of federal power, and instead created doctrines that shielded the right of state legal systems to segregate and the freedom of private property owners to discriminate.

Even after the gates of federal power were thrown open during the New Deal, it was still not clear whether the national government had the power to overcome these deeply inbred practices and principles of discrimination. It was not until *Brown* changed the standards of Section 1 that this objective became imaginable. And even then, it was not until thousands of protests forced the federal hand that Congress was finally willing to enact the Civil Rights Act of 1964 to accomplish what the Framers of the Fourteenth Amendment thought they had achieved.

When we speak of using the values of federalism to restrict the scope of federal power in the context of national antidiscrimination statutes, therefore, we are speaking of a trust put into federal hands by the Framers of the Fourteenth Amendment, taken away by the Court for almost a century, but, after struggle, returned to national authority in the 1960s. This assumption of federal authority was vindicated by all three branches of the federal government. The question of federalism thus merges with the question of the federal government's proper role in combating discrimination. For whatever might be said about Section 5 power generally, the use of Section 5 power to combat unconstitutional discrimination cannot be conceived as a potential threat to the legitimate balance of the federal system so long as this history retains its normative force.

Id. at 507-08.

18. *Id.* at 446.

19. *Morrison*, 529 U.S. at 619 (internal quotations omitted).

is our attempt to give form and substance to the unquiet ghosts whose stories lie deep in American legal and constitutional history.

As one of us has recently noted, the story of "race law" is ordinarily taken to be the story of equality law.²⁰ In this equality story, despite many setbacks, "We, the People" gradually enlarges to embrace everyone. African Americans are the central characters in this story. Their inspiring journey from slavery to freedom, from apartheid to the American mainstream, is taken as a metonym for the optimistic story of American racial struggle generally, a story that ends with Martin Luther King, Jr.'s "I Have a Dream" speech.²¹

While the African American struggle against slavery and for equality retains central importance in United States history and in our book, *Race and Races* attempts to tell a more comprehensive story of race in the United States. It is an alternative to the fragmented, separated treatment that racial topics typically receive, if treated at all, in the law school curriculum (p. 2). As Professor Robert Williams, Jr., notes, we have attempted to produce a book which presents "multiple race perspectives on American law," to teach "how the rule of law has been applied to a much broader set of racial minority groups in this country, and the strategies those groups have adopted to survive and create a diverse America."²²

We hope to teach students that race has always mattered in the United States, and that it continues to matter in many ways that they may or may not have understood before. Some of the most profoundly important events in the early history of the colonies and the country were racial events. The conquest, displacement, and removal of Indians yielded land for the expansion of the colonies, and later the United States (pp. 173-216). The enslavement of Black Africans supplied labor for Southern agriculture (pp. 91-129). We still confront the powerful repercussions of these events today in Indian claims for self-determination (pp. 220-28) and in African American claims for reparations (p.412).²³

One striking way to understand the relevance of race to legal education is to consider the enormous amount of law, assumed to be independent and unrelated, that nonetheless emerges as closely related when race and racism are used as organizing principles. For example, law school curricula

20. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1927-28 (2000).

21. See A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217 (James M. Washington ed., 1991). See also Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (noting that equality law, and civil rights generally, are commonly equated with the African American experience).

22. Robert Williams, Jr., *Do You Believe in the Rule of Law?*, 89 CALIF. L. REV. 1633, 1637 (2001).

23. See, e.g., RANDALL ROBINSON, *THE DEBT* (2000).

may typically include separate courses on Indian Law, Immigration Law or History, Civil Rights, and Equal Protection. These are all treated as separate and discrete disciplines. This curricular separation tends to obscure the independent significance of race and racism. As Professor Margalynne Armstrong points out, when students are not exposed to the racial dynamics lurking in these other courses, issues of race and racism that should be raised are instead ignored.²⁴

When race and racism are used as lenses through which to view the law in these traditionally separate subject areas, a unified story of race in the United States emerges. For example, consider how Europeans sought to justify the conquest of Indians and the usurpation of Indian lands by presuming the inferiority of Indian peoples. As Chief Justice Marshall wrote in *Johnson v. McIntosh*, “the character and religion of [the Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy” (pp. 175-76). Europeans justified Black slavery in similar terms. Indeed, abolitionism and the struggle against Jim Crow included, as central components, challenges to the presumed inferiority of Blacks (pp. 141-56). From 1790 to 1952, immigration law was a remarkable forum for the development and definition of Whiteness and the exclusion of many non-Whites. In 1790, the first condition for naturalized citizenship was that one be a “free white person,” presumed to be fit, temperamentally, intellectually, and morally, to participate in the affairs of government (p. 583). Of course, in *Dred Scott v. Sandford* (pp. 123-25), the Supreme Court decided that Africans and African Americans, whether slave or free, were never intended to be considered citizens under the federal constitution. During the latter half of the nineteenth century, the federal courts decided who qualified as a “white person” for naturalization (pp. 429-33). The courts, including the Supreme Court, decided that immigrants from China, Japan, India, and other nations were not “white” and therefore not entitled to citizenship (pp. 429-40).²⁵ Astonishingly, the racial qualification for naturalization remained in place until 1952.²⁶

Thus, traditional civil rights law and equal protection, Indian law, and immigration law all form important parts of the history and construction of racial identities in the United States. Remarkably, even integrating all of these ostensibly disparate areas of law, one would learn nearly nothing about Latinos/as.²⁷ Much of the story of Latinos/as in the United States lies in the race-based conquest of Mexico and later Puerto Rico, and in the

24. Margalynne Armstrong, *Teaching by the Book*, 89 CALIF. L. REV. 1625, 1626-27 (2001).

25. See also IAN HANEY LÓPEZ, *WHITE BY LAW* (1996).

26. *Id.* at 49.

27. See, e.g., Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (describing the production of Latino/a invisibility); *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998).

extraordinary legal process through which one-half of Mexico became the Southwestern United States (pp. 246-97). After the military conquest, this legal process began with the Treaty of Guadalupe Hidalgo in 1848 (pp. 260-66), and continued with land grant adjudications decided by the Taney Court and later Courts in the mid-to-late nineteenth century (275-98). Litigation continues even today over the validity of dispositions of Mexican land grants.²⁸

While White racism has influenced powerfully the destinies of all people of color in this country, it is important to understand that the forms that racism takes are not the same with respect to each of the groups affected by it. Including multiple race perspectives in our book provides historical background for understanding the varied ways that racism affected and affects different communities of color. By giving prominent attention to the particular histories of the major racial groups in the United States, including Whites (pp. 429-99),²⁹ we hope to facilitate important comparisons, linkages, and distinctions regarding the conditions faced by the different groups. For example, consider the period 1880-1900. In 1882, anti-Chinese agitation in California culminated in congressional enactment of the federal Chinese Exclusion Act, which prohibited the immigration of Chinese laborers into the United States (pp. 382-84). Subsequently, the Supreme Court upheld the exclusion acts in 1889 in *Chae Chan Ping* (p. 384-88). In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, which destroyed Indian tribal sovereignty by breaking up lands held jointly by the tribes and allotting these lands in separate parcels to individual tribal members (pp. 215-16). This Act led to reductions in the land base controlled by Indian tribes. And in 1896, the Supreme Court decided *Plessy v. Ferguson* (pp. 142-47),³⁰ upholding and encouraging racial segregation. In 1898, during the Spanish-American War, the United States conquered Puerto Rico, Cuba, and the Philippines and invaded Hawaii (326-28).

Thus, during this twenty-year period, aggressive United States colonialism combined with severe internal repression of racial minorities. Only by comparing the histories of the different racial groups can one identify and explain this phenomenon. Indeed, *Race and Races* illustrates how United States racial history follows a zigzag path, sometimes forwards,

28. See, e.g., PETER NABOKOV, *TJERINA AND THE COURTHOUSE RAID* (1969); *Symposium: Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 SW. J. L. & TRADE AM. 5 (1998).

29. See also CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

30. 163 U.S. 537 (1896).

often backwards.³¹ Readers will also discover how this is not at all accidental.³² Society often arranges it so that one racial group is in favor while another is intensely repressed.³³ Seeing the checkerboard of racial progress and the way groups are often played off against each other helps the reader understand the behavior of higher courts today.

Professor Abrams suggests that a chronological sequence might have been preferable for facilitating such comparisons.³⁴ We respectfully disagree. Part of the aim of providing separate chapters for the major racial groups was to demonstrate the nature, degree, and particularity of the racism experienced by each and to emphasize the trends and advances just described. Not all racism is the same, nor has it played out in the same way for each group. These dynamics and particularities likely would have been obscured had we taken a purely chronological approach.

II

RESPONSES TO REVIEWS OF *Race and Races*

As Professors Abrams and Yamamoto correctly note, the authors of a casebook are in a luckier position than most: we have the opportunity to correct our mistakes in subsequent editions.³⁵ We embrace several goals for the next edition that the contributors to this colloquy have identified. Professor Yamamoto suggests a richer chapter on Asian Americans and an extended treatment of reparations.³⁶ Professor Abrams suggests a sustained examination of the relationship between race, class, and poverty. We also take to heart Abrams' suggestion that we pay more attention to lawyering strategies beyond the strictly conventional and the purely interpersonal. Beyond these, some of our reviewers raised issues requiring more extensive responses.

A. *Professor Abrams*

Abrams' suggestion that the book could use "more emphasis on the affirmative meanings assigned to race"³⁷ is an interesting one. If all Abrams means by her suggestion is that we could have added material on the unintended benefits of racial segregation, that is certainly right. Perhaps

31. See also Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283 (2000); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 1999).

32. *Id.* at 290-93.

33. *Id.* at 291.

34. See Kathryn Abrams, *Race and Races: Constructing a New Legal Actor*, 89 CALIF. L. REV. 1589, 1601 (2001).

35. See *id.* at 1602; Eric K. Yamamoto, *Teaching Race Through Law: "Resources for a Diverse America"*, 89 CALIF. L. REV. 1641, 1645 (2001).

36. See Yamamoto, *supra* note 35, at 1645-51.

37. See Abrams, *supra* note 34, at 1599.

we should have also made more references to the racial pride and kinship that most people of color feel deeply. But Abrams' comment raises a deeper question that many have struggled with: are there, in fact, "affirmative meanings assigned to race"? Certainly as an accidental by-product, racism has given rise to political solidarity, family feeling among strangers, a vivid sense of historical connection to those who came before; vibrant cultural traditions; and deep commitments to justice. But are these "affirmative meanings assigned to race"? Or are they inherently reactive in nature? If racism were somehow vanquished, what would be left of race? Noel Ignatiev, calling for the abolition of the White race, argues that Whiteness is nothing but the label for unjust privilege (pp. 489-93). Does "race" itself have content, once it is disentangled from cultural, historical, and political identity? We think we have done right by not answering these questions. Indeed, given that racism is unlikely to be eliminated any time soon, it is not clear that these questions are pressing ones. Instead, since the central meaning of "race" seems to turn on historically contingent value judgments, beliefs and faiths that support relationships of differential power and subordination, our approach has been to examine the nature of the historical development and expression of these beliefs.

One lesson our book teaches is that the dominant society in practically every era has assigned positive images to itself and to Whiteness. One chapter of *Race and Races* (pp. 429-99), for example, details how color imagery and invisible privileges provide an "affirmative meaning assigned to (the white) race" (pp. 464-78). By the same token, popular culture (pp. 959-1016) almost invariably assigns negative meanings and images to groups of color, except for the rare periods in which it assigns ridiculously romanticized ones to them such as the noble savage.

Professor Abrams also encourages us in the next edition to address interminority tensions and conflicts.³⁸ This is a sore point in communities of color right now. Consider a situation like the controversy over admissions quotas at Lowell High School challenged in *Ho v. S.F. Unified School District* (p.745), where tension persists between Asian Americans and African Americans. We decided the proper role for us as casebook authors was to discuss the *Ho* case as an example of the need for negotiation and coalition, and to show that intergroup social dynamics may sometimes be fraught with the same struggles over self-interest as those between a minority group and the majority. We doubt that it would be wise for us to do more than this. In particular, we think it would be unwarranted for us to take a stand on who is right and who is wrong in that controversy. While intergroup complaints between communities of color might theoretically rise to such an egregious level that progressive scholars such as ourselves could not avoid taking a stand, we found no such cases in our research.

38. *Id.* at 1601.

Professor Abrams also chides us, somewhat surprisingly, for remaining mired in a Black-White paradigm.³⁹ This casebook, of course, is the first expressly to expand beyond that paradigm and consider the racial fortunes, issues, problems, and histories of all the major groups of color in the United States, and include the construction of Whiteness (pp. 304-09, 471-77). Thus, practically every chapter on a substantive topic, such as hate speech or popular culture, devotes attention to all the major groups. However, one of the lessons of the differential racialization thesis is that each of the groups has been racialized in different, but overlapping, ways (pp. 1-2, 14-15). Thus, for example, immigration and language rights play little role in Black history. Mexican Americans suffered conquest, but were not enslaved in a literal sense. Accordingly, any organizational scheme that sets out to march determinedly through a four-part matrix under every single topic heading would distort history. Thus, we have tried to devote attention to the rich tapestry of race, realizing that not every strand attaches to every other.

Professor Abrams also complains that our book is missing a praxis.⁴⁰ Robert Williams provides part of the answer to that complaint: Indian history (like that of most of the groups we consider) teaches legal skepticism.⁴¹ We believe that a book that highlights how frail a reed the law has proven to be for oppressed peoples provides a valuable dose of skepticism and realism for would-be lawyers. The young lawyer wins cases she knows she should have lost, loses cases she knows she should have won. Judges can be biased. Jurors can kowtow to a domineering foreperson. One's clients can lose their nerve or lie. We suspect that law students who take the time to develop their own radical critique of social institutions, including the law, will enter practice with a type of psychic armoring that will enable them to persevere in the face of resistance and disappointment. Perhaps this is the most valuable praxis lesson of all, and one we very much hope readers will take from our book.

B. Professor Alfieri

Toward the end of his critique, Professor Alfieri poses a curious challenge. "To render prescriptive counsel properly," he writes, *Race and Races'* editors "must confront the tension dividing modern and postmodern modes of analysis."⁴² He notes that we appear to both "condemn and exploit the hegemonic logic of law."⁴³ We also simultaneously "ridicule and embrace formalism and process values . . . [and both] celebrate

39. *Id.* at 1600.

40. *Id.* at 1601-02.

41. Williams, *supra* note 22, at 1634-36.

42. Anthony Alfieri, *Teaching the Law of Race*, 89 CALIF. L. REV. 1605, 1624 (2001).

43. *Id.*

multiracial identity and assail"⁴⁴ those methods of advocacy that appear to him incompatible with that identity. He suggests that we are ambivalent about rights.⁴⁵ To be sure, Alfieri professes a gracious understanding of our predicament, for we "labor in the ambiguity of this long moment of transition."⁴⁶ He concludes by declaring "We should be grateful for their leadership. We should hope they do not grow weary."⁴⁷

We are not weary. However, if we were to set ourselves the task of reconciling modernism and postmodernism, formalism and its opposite, multiracialism and conventional Anglocentric advocacy, we might well grow so. But these are not our tasks. As we imply in the sections devoted to strategies and methods of reform, we are prepared to embrace an unapologetic eclecticism (pp. 3, 1091-1154). Just as race and racism take different forms at different periods and in relation to different minority groups, the tools of resistance must likewise vary. In one setting, litigation may be a perfectly sensible means of confronting a particular evil. In another, litigation may be fruitless; mass demonstration or storytelling⁴⁸ or enlistment of race traitors⁴⁹ may be needed. Some racial roadblocks may yield to discourse analysis; others may be better addressed by efforts to change material conditions.⁵⁰ In some situations, such as the army or organized sports, formality may guarantee at least a degree of fairness.⁵¹ In others, free-flowing coalition politics and interpersonal friendships may be what the situation requires.

In short, the traditional either/or categories Alfieri lists are not well tailored to addressing the vast panoply of race. This is both a disadvantage and a blessing. Students and fellow travelers cannot tie themselves to a single theory of race, any more than they can rely on a unitary method of resistance.

CONCLUSION

The complexity of "race," of "races," and their development and deployment through United States history cannot be confined by simple categories and facile resolutions. Some of the questions raised by our reviewers

44. *Id.*

45. *See id.*

46. *Id.*

47. *Id.*

48. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

49. On the concept of race traitor, *see* *Race and Races* (pp. 489, 493).

50. *See* Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001); Delgado, *THE LATINO/A CONDITION*, *supra* note 27, at 303-45 (describing role of rebellious lawyering and street politics in effecting reform).

51. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

allow no easy solutions. Accordingly, the multidisciplinary, historical approach we have taken in the book is pragmatic and eclectic.⁵² We have sought to give voice to stunning silences and omissions of race, to provide history and resources that we hope will enable us, in Professor Yamamoto's words, "to 'talk about it.'"⁵³

The perceptive insights of these distinguished reviewers give us much to think about. We are grateful to them for their knowledge, their insights, and their criticisms, all of which we find helpful in understanding what our book means to others and how we can make it better.

52. *Cf.* Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347, 353 (2000) ("Good lawyers do not obsessively adhere to a single theory. Instead they try to keep their minds free so that they are receptive to various ways of formulating the issues."); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990) ("We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on.").

53. Yamamoto, *supra* note 35, at 1651. Even as we write, the conservative American Civil Rights Coalition, an arm of Ward Connerly's American Civil Rights Institute, has unveiled a new proposed initiative for the March 2002 California ballot. The measure, titled the "Racial Privacy Initiative," would prevent the state from "classify[ing] any individual by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment." Under the measure, the state would be prohibited from collecting data about an individual's race on government forms for the purpose of detecting racial discrimination. Letter from Kevin Nguyen, Executive Director, and M. Royce Van Tassell, Director of Research, American Civil Rights Coalition, to Tricia Knight, Initiative Coordinator, Office of the Attorney General of California, 2-3 (Feb. 20, 2001) (on file with authors). However, police uses of race, including the controversial practice of "racial profiling," would be specifically exempted from the ban. Letter from Elizabeth B. Guillen, Legislative Counsel, Mexican American Legal Defense and Education Fund, to Joe Shinstock, California Department of Finance 7-8 (Mar. 14, 2001) (on file with authors) (arguing that law enforcement will, in practice, have a difficult time distinguishing uses of race authorized by the statute and those not authorized). *But see* Libertarian Party, Reviewer's Guide to the "California Racial Privacy Initiative" (Jan. 12, 2001), at http://www.peoplesveto.org/lp/text_files/010112%20Initiative.txt (claiming that "[s]ince racial profiling is already illegal, this exemption does not make it legal"). Yet another attempt to make matters of race unspeakable seemingly awaits in the wings.